

**TAKING SUFFERING SERIOUSLY:
A ROBUST APPROACH TO ENFORCING
THE RIGHT TO NATIONALITY OF
STATELESS PEOPLE**

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ABSTRACT

This thesis interrogates the continued statelessness of more than 12 million stateless people around the world, in the face of Article 15 of the United Nations Declaration of Human Rights (UDHR), which provides that everyone has a right to a nationality. Its principal argument is that the continued unresolved presence of stateless groups around the world exposes international law's inadequate protection of the 'right to a nationality'. It advocates the adoption of a robust approach to protect and enforce this right to nationality of stateless people.

Article 15 of the UDHR has been complemented by a host of international and regional instruments relating to the right to nationality. In developing its argument, the thesis reviews the relevant instruments, as well as local and international judicial decisions relating to the right. The review is juxtaposed with local legislation and state practices on the issue of citizenship, for the purpose of determining the status of the right, and whether the right forms part of customary international law.

This thesis also examines the emergence of nationality as a human right under international law and the interplay between states sovereignty and the right to nationality, for the purpose of showing the lacuna in international law that allows continued statelessness. It examines the relationship between the possession of nationality and the enjoyment of other human rights vis-à-vis the sufferings that arise from statelessness, as well as the extent to which denationalization is a step toward genocide, for the purpose of showing that protection of the right qualifies as *erga omnes* obligation. It also argues that suffering of stateless people must be taken seriously, as a step toward taking the *right* to nationality of stateless people *seriously*.

While the thesis does not necessarily provide the final solution to all the problems arising out of statelessness, it is anticipated that it will make a worthy contribution to addressing the legal questions on statelessness and, more importantly, provide a sound basis for further discussions on the status, importance and the need to protect and enforce the right to nationality of stateless people.

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DEDICATION

This thesis is dedicated to the 12 million stateless people around the world.

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CHAPTER ONE

STATELESS PEOPLE: *TAKING THEIR SUFFERING SERIOUSLY*

This thesis interrogates the continued statelessness of groups like the Rohingyas and the Bidoons in the face of international law's recognition of 'right to nationality'. It argues that the continued unresolved presence of stateless groups around the world exposes international human rights law's inadequate protection of the right to a nationality. It advocates the adoption of a robust approach to protecting and enforcing the right to nationality of stateless people.

Article 15 of the United Nations Declaration of Human Rights (UDHR)¹ provides that everyone has a right to a nationality. This provision has been complemented by a host of international and regional instruments bordering on right to nationality or reduction of statelessness.² However, in spite of the provision, the Burmese Rohingyas, Kuwaiti Bidoons and the 'Non-Citizens' of Latvia, amongst others, do not have any nationality; they are stateless. They are part of an estimated 12 million stateless people around the world; in Asia, Middle East, Africa, and Europe.³ These stateless people are living in limbo, suffering untold hardships, severely and harshly discriminated against wherever they are. They have little or no access to basic education, healthcare and other social services. They usually do not participate in the political affairs of their place of residence. Although most stateless people are found in 'refugee' camps around the world, they are in a dilemma. Unlike other refugees who have a right to return to their 'own' country, these stateless people usually have no place to call 'home'. As Seckler-Hudson aptly puts it, they are forever prohibited from saying "this is my own, my native land".⁴

¹ UNGA, *Universal Declaration of Human Rights*, 10 December 1948, G.A 217 A (III), U.N. Doc. A/810 at 71 (1948).

² The international and regional instruments are discussed in chapter two.

³ UNHCR, "Media Backgrounder: Millions Are Stateless, Living in Legal Limbo" online: UNHCR < <http://www.unhcr.org/4e54ec469.html>>; see also, Equal Rights Trust, *Unravelling Anomaly Detention, Discrimination and the Protection Needs of Stateless Persons* (London-UK: Equal Rights Trust, 2010), 3.

⁴ Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* (New York: American University Graduate School, 1934) at 12 [Seckler-Hudson].

1.0 OVERVIEW OF THE WORK

The thesis reviews various international and regional instruments dealing with nationality and statelessness, as well as municipal and international judicial decisions relating to the right to nationality. The review of the international and regional instruments is juxtaposed with local legislations and state practices of various countries on the issue of citizenship, for the purpose of determining the status of the right to nationality, and whether the right is part of customary international law; and also whether the protection of the right qualifies as an *obligatio erga omnes*.

This thesis adopts a critical approach to examining the right to nationality. The approach combines the views espoused in Ronald Dworkin's *Taking Rights Seriously*,⁵ Upendra Baxi's *Taking Suffering Seriously*,⁶ and William Felice's *The Case for Collective Human Rights*.⁷ The thesis acknowledges the existence of divergent views on the concept of "human right" and the fact that the question of "what is exactly meant by human rights remains controversial and ambiguous."⁸ Notwithstanding the lack of consensus on the meaning of *human right*, the thesis' approach proceeds from the proposition that when one says that a person has a *right* to something: it means that person is *entitled* to that thing, and if a person is *entitled* to something, it means he is entitled to *demand* for it and it will be *wrong or unlawful to deprive* him/her of it.⁹

⁵ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) [Dworkin].

⁶ Baxi, Upendra, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" (1985) 4 Third World Legal Studies, 107 [Baxi].

⁷ William F. Felice, "The Case for Collective Human Rights: The Reality of Group Suffering" (1996) 10 Ethics and International Affairs 47 [Felice].

⁸ Julie Harrelson-Stephens & Rhonda L. Callaway, "What are Human Rights? Definitions and Typologies of Today's Human Rights Discourse", in Rhonda L. Callaway & Julie Harrelson-Stephens, eds., *Exploring International Human Rights; Essential Readings* (Colorado: Lynne Rienner, 2007), 4 [Harrelson-Stephens & Callaway].

⁹ For a general discussion on the divergent views of (human) rights: see Michael Haas, *International Human Rights: A Comprehensive Introduction* (Oxon: Routledge, 2008), 3 ["the power or privilege to which once is justly entitled" and then concludes that human rights 'involve the ability to demand and enjoy a minimally restrictive yet optimal quality of life with liberty, equal justice before the law, and an opportunity to fulfil basic cultural, economic and social needs']; Peter Bailey, *Bringing Human Rights to Life* (Sydney: The Federation Press, 1993), viii ["statements of standards of behavior we should be able to expect between individuals and

In other words, a *right* is an *entitlement to demand* for something that is right – in the sense of what is important or necessary for the proper quality of life – for every human being.

Dworkin in his *Taking Rights Seriously* argues that “if rights make sense at all, then the invasion of a relatively important right must be a very serious matter. It means treating a man as less than a man, or less worthy of concern than other men”.¹⁰ Using Dworkin’s *Taking Rights Seriously*, this thesis argues that the statelessness of stateless people means that each of them is being treated “less than a man, or less worthy of concern than other men”, and their right to nationality is a “relatively important right” – the “invasion” of which should be “a very serious matter”.

Inspired by Dworkin’s *Taking Rights Seriously*, Baxi used the idea of *Taking Suffering Seriously* to advocate the “active assertion of judicial power to ameliorate the miseries of the masses.”¹¹ He also advocates the interpretation of statutory provisions with a strong bias in favour of human rights.¹² His main contention is that *taking rights seriously* requires *taking suffering seriously*. Using Baxi’s *Taking Suffering Seriously*, this thesis examines the suffering that arise from statelessness to make a case for the necessity of *taking the right to nationality of stateless people seriously*.

Felice also used the concept of *Taking Suffering Seriously* to advocate the protection of collective rights. According to him, “[t]o take suffering seriously we must address both individual and group oppression.”¹³ He contends that “[g]roup and individual rights are

groups. Because they are *human* and not citizens’ rights, they apply to everyone everywhere”]. See also Thomas Fleiner, *What Are Human Rights?* (Sydney: The Federation Press, 1999), 8; Jerome J. Shestack, ‘The Philosophic Foundations of Human Rights’ (1998) 20 *Human Rights Quarterly* 201, at 203 [Shestack] Gerbard von Glabn and James Larry Taulbee, *Law Among Nations: An Introduction to Public International Law*, 8th ed (New York: Pearson Education, 2007), 4; Ian Brownlie, *Principles of Public International Law*, 6th ed, (Oxford: Oxford University Press, 2003), 1 – 25; Malcom N. Shaw, *International Law*, 6th ed, (Cambridge: Cambridge University Press, 2008), 1 – 30; Rebecca M.M. Wallace, *International Law*, 5th ed, (London: Sweet & Maxwell, 2005), 1 – 2; Mark Freeman & Gibran Van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004), 3 – 5.

¹⁰ Dworkin, *supra*, note 5, at 199.

¹¹ Baxi, *supra*, note 6, at 111.

¹² *Ibid*, at 116 – 119.

¹³ Felice, *supra*, note 7, at 47.

interdependent in that certain individual rights cannot be exercised outside the group context. In many instances, individual rights can be fully realised only through the understanding and protection of group rights.”¹⁴ For example, trade union rights must be protected to give the individual the freedom to join a union, and minority culture must be protected if, its individual members are to enjoy it.¹⁵ The crux of Felice’s argument seems to be that although some individual members of a group (for example the African-Americans) will be able to enjoy some basic rights, it does not detract from the general group suffering. He thus contends that there is a need to protect the whole group, so that more individuals will be protected.¹⁶ Using Felice’s conception of *Taking Suffering Seriously*, this thesis will focus on the statelessness of the Burmese Rohingyas and Kuwaiti Bidoons as group, as opposed to individuals’ statelessness. This is because, as will be shown below, most cases of statelessness arise from the exclusion of the targeted groups from being part of the relevant state.

This thesis is divided into five chapters. This first chapter deals with introductory matters and the factual background of the thesis. Chapter two focuses on the emergence of right to a nationality under international law. It contextualizes the term ‘nationality’ and the relationship between nationality and ‘citizenship’. It also examines statelessness and some of its causes. Chapter three examines the interplay between states’ sovereignty and the right to nationality. It also examines the effects of the clash between the right to nationality and state sovereignty, and whether the right to nationality forms part of customary international law. It examines the lacuna in international law that allows continued statelessness. Chapter four examines the qualification of the protection of right to nationality as an *obligatio erga omnes* from two perspectives: (a) the right to nationality as a ‘basic right’, that is, the relationship between the possession of nationality and the enjoyment of other human rights, and (b) the relationship between denationalization/statelessness and the *erga omnes* duty to prevent genocide. Chapter five proffers recommendations and concludes.

¹⁴ *Ibid*, at 50.

¹⁵ *Ibid*.

¹⁶ *Ibid*, at 50 – 51. See also William F. Felice, *Taking Suffering Seriously: The Importance of Collective Human Rights*, (Albany: State University of New York Press, 1996).

2.0 FACTUAL BACKGROUND

As will be shown later in this thesis, there have been numerous cases of statelessness over time and in diverse situations. However, this thesis will focus on the predominant type of statelessness, i.e., that which arises by virtue of state legislations. Consequently, this thesis will use the factual situation of three stateless groups, namely, the Burmese Rohingyas, Kuwaiti Bidoons and 'Non-Citizens' of Latvia, to interrogate continued statelessness vis-à-vis the right to nationality. Of the three groups, the Rohingyas will be the main focus, while the Kuwaiti Bidoons and the 'Non-Citizens' of Latvia are examined for comparative analysis. The focus is on these three groups because their factual situation is representative of the situations of other groups rendered stateless by state legislations. The relevant factual situation includes: the socio-political situation of their respective countries, whether their respective countries have adopted or ratified relevant international human rights instruments, factors that gave rise to their statelessness and the attitude of neighbouring countries to these three stateless groups, that is, whether they are able to freely move from one neighbouring country to another.

2.1 The Rohingyas

The Rohingyas¹⁷ are a Muslim minority group residing in Arakan State in the western coast of Burma.¹⁸ There are about 800,000 Rohingyas in Arakan, constituting 25% of the state

¹⁷ The origin of term 'Rohingya' is disputed. The main grouse against the term is that it was allegedly invented in the 1950s and does not represent all the Muslim groups in Arakan. See for example, Irish Centre for Human Rights, "Crimes against Humanity in Western Burma: The Situation of the Rohingyas" (Galway: National University of Ireland, 2010), 22 – 23 [ICHR Report]; Aye Chan, "The Development of a Muslim Enclave in Arakan (Rakhine) State of Burma (Myanmar)" (2005) 3 SOAS Bulletin of Burma Research 396 at 397 available online at <<http://www.soas.ac.uk/sbbr/editions/file64388.pdf>> [Aye Chan]. However, one available report suggests the term was used as far back as 1799, see Human Rights Watch "The Government Could Have Stopped This" Sectarian Violence and Ensuing Abuses in Burma's Arakan State' August 2012 Report, 12 online: HRW <http://www.hrw.org/sites/default/files/reports/burma0812webwcover_0.pdf> [HRW 2012]. However, the ICHR Report (p. 23) observes that the Muslims resident in North Arakan prefer to be designated "Rohingya" as opposed to "Burmese Muslim" and they have developed a culture and language which is absolutely unique to the region. Like the ICHR Report, this thesis takes the position that 'the term "Rohingya" is a legitimate identifier for this group.

population, but a large number of Rohingyas presently live outside Burma, including over 200,000 in Bangladesh. The origin of the Burmese Rohingyas, as well as how long they have been residing in North Arakan, is disputed. On one hand, there is a claim that they are descendants of the first Muslim inhabitants of Arakan, who arrived at the erstwhile Arakan Kingdom in or around the 9th century.¹⁹ On the other hand is the claim that they are descendants of Bengali immigrants from the Chittagong District in modern Bangladesh who had migrated to present-day Burma as agricultural workers for the (colonial) British East Indian Company in the 1830s.²⁰ However, there is no dispute that, at the time of independence from Britain in 1948, Burma had a sizeable Rohingya population, who had been in Burma for at least a century, and have always either regarded themselves as Burmese, or had nowhere to go because they lost contact with their alleged native place. It is noteworthy that some reports state that the Rohingyas took active part in Burma's quest for independence in 1948 and formed part of the early national government, established under the independence Constitution.²¹

¹⁸ In 1989, the then Military Government of Burma changed its name to "Union of Myanmar" after the series of pro-democracy protests of 1988. The United Nations and most of the world has recognized the change of name, but the United States, the United Kingdom, as well as some pro-democracy and minority groups in the country, do not accept the legitimacy of the Military Government's change of name. The thesis will use the name 'Burma' in solidarity with the Rohingyas and other minority groups.

¹⁹ See generally, ICHR Report, *supra*, note 17, at 22; Amnesty International, Myanmar The Rohingya Minority: Fundamental Rights Denied (May 2004) p.2, online: Amnesty International <<http://www.amnesty.org/en/library/asset/ASA16/005/2004/en/9e8bb8db-d5d5-11dd-bb24-1fb85fe8fa05/asa160052004en.pdf>> [Amnesty, 2004]; Habib Siddiqui: "Rohingya: The forgotten people" (2007), online: ARNO <<http://www.rohingya.org/portal/index.php/scholars/44-dr-habib-siddiqui/143-rohingya-the-forgotten-people.html>>; Physicians for Human Rights, "Stateless and Starving: Persecuted Rohingya flee Burma and starve in Bangladesh" (Emergency Report, 2010), online: PHR <https://s3.amazonaws.com/PHR_Reports/stateless-and-starving.pdf>.

²⁰ See for example, the address of the then Head of State, General Ne Win's (delivered at the Meeting held in the Central Meeting Hall, President House, Ahlone Road, 8 October 1982) translated by *The Working People's Daily*, 9 October 1982, online: Burma Library, <http://www.burmalibrary.org/docs6/Ne_Win%27s_speech_Oct-1982-Citizenship_Law.pdf>. See also Aye Chan, *supra*, 399 – 402.

²¹ See for example, Eileen Pittaway, "The Rohingya Refugees in Bangladesh: A Failure of International Protection Regime" in Howard Adelman, ed., *Protracted Displacement in Asia, No Place to call Home* (Hamshire England: Ashgate, 2008) at 83 – 106; Chris Lewa, "The Rohingya: Forced Migration and Statelessness" in Omprakash Mishra, ed., *Forced Migration in South Asian Region*, (Washington D.C: Centre for Refugee studies Jadavpur University, Calcutta and Brookings Institution Project on Internal Displacement, 2004) 325; Chizom Ekeh, *Minorities*

The independence Constitution of Burma²² defined Burmese citizenship to include: (a) “every person, both of whose parents belong or belonged to any of the indigenous races of Burma”,²³ or (b) “every person who was born and who has resided in any of the territories included within the Union for a period of not less than eight years in the ten years immediately preceding the date of the commencement of the Constitution or immediately preceding the 1st day of January 1942 and who intends to reside permanently there in and who signifies his election of citizenship of the Union in the manner and within the time prescribed by law.”²⁴ This citizenship definition was complemented by the Union Citizens Act²⁵ which provides that “for the purposes of section 11 of the Constitution the expression ‘any of the indigenous races of Burma’ shall mean the Arakanese, Burmese, Chin, Kachin, Karen, Kayah, Mon or Shan race and such racial group as has settled in any of the territories included within the Union as their permanent home from a period anterior to 1823 A. D. (1185 B.E.).”²⁶ The Act also provides that “any person *descended from ancestors who for two generations at least have all made any of the territories included within the Union their permanent home* and whose parents and himself were born in any of such territories *shall be deemed to be a citizen* of the Union.”²⁷ Although there was apparently no explicit reference to the Rohingyas in the 1948 Citizens Act, the Rohingyas were nonetheless regarded as or deemed to be Burmese citizens (probably as being part of “Arakanese”) at the time of the country’s independence – hence they took part in the quest for independence and early national government.²⁸

There also are reports which suggest that the Rohingyas themselves have had histories of ethnic clashes with other ethnic groups in Arakan prior to Burma’s independence and they were accused of disloyalty to the Burmese cause during and after the Second World War (WWII).

in Burma (Minority Rights Group International, October 2007) online: Minority Rights Group International <<http://www.minorityrights.org/?lid=3546>>.

²² The Constitution of the Union of Burma, 1947.

²³ *Ibid*, section 11(i).

²⁴ *Ibid*, section 11(iv).

²⁵ Act No. LXVI of 1948 available online: Burma Library <http://www.burmalibrary.org/docs/UNION_CITIZENSHIP_ACT-1948.htm>.

²⁶ *Ibid*, section 3(1).

²⁷ *Ibid*, Article 4(2) (emphasis supplied).

²⁸ See note 21 and accompanying text above.

According to a report of the Irish Centre for Human Rights, “[t]hroughout the Japanese occupation of Burma during World War II, the Rohingyas remained loyal to the British, who promised to reward them with their own independent Muslim State, and they were thus seen as standing in the way of the Burmese independence movement, led by General Aung San, who had struck an independence deal with the Japanese.”²⁹ After the war, the Rohingyas reportedly lobbied the British colonial ruler for Arakan to be part of Muslim Pakistan shortly before independence. According to Smith, “this move more than any other...determined the present-day governmental attitude towards the Rohingyas: they had threatened Burma’s territorial integrity on the eve of independence and could never be trusted again.”³⁰ The move also “forms the basis of the frequent claims that the Rohingyas are simply foreigners or ‘Kala’ intending on seceding from the Union of Burma”.³¹ Although the foregoing affected the general attitude of other ethnic groups to the Rohingyas, their citizenship travails can be traced directly to a series of discriminatory policies of the General Ne Win-led military government which seized power via a *coup d’état* on 2 March 1962.³²

First, the independence constitution of 1947 was suspended and later replaced by the 1974 Constitution,³³ which contains no provision on Burmese citizenship.³⁴ This was followed, in 1977, by an *Operation Nagamin* (“King Dragon”), whose declared aim was to “scrutinize each individual living in the State, designating citizens and foreigners in accordance with the law and taking actions against foreigners who have filtered into the country illegally.”³⁵ According to a report, *Operation Nagamin* became a “vehicle for the commission of extreme violence against the Rohingyas”, and this led to a mass exodus of the Rohingyas, involving some 200,000 people

²⁹ ICHR Report, *supra*, note 17, at 24.

³⁰ Martin Smith, *Burma: Insurgency and the Politics of Ethnicity*, 2d ed, (London. Zed Books, 1999) 41, cited in ICHR Report, *supra*, note 17, at 25.

³¹ ICHR Report, *supra*, note 17, at 25.

³² See generally, Vincent Boudreau, *Resisting Dictatorship: Repression and Protest in Southeast Asia* (Cambridge-UK: Cambridge University Press, 2004) 37-51; David I. Steinberg, *Burma: The State of Myanmar* (Washington D.C: Georgetown University Press, 2001), 1 – 27.

³³ The Constitution of the Socialist Republic of the Union of Burma, 1974, online: Thailand Law Forum <<http://www.thailawforum.com/database1/constmyanmar.html>>.

³⁴ See Robert H. Taylor, “Burma's National Unity Problem and the 1974 Constitution” (1979) 1:3 Contemporary Southeast Asia 232.

³⁵ ICHR Report, *supra*, note 17, at 25.

who fled across the Burma-Bangladesh border between 1978 and 1979.³⁶ About 10,000 Rohingyas also reportedly died from starvation and disease arising from deplorable conditions in refugee camps and as a result of the Bangladeshi authorities forcefully deporting most of the fleeing Rohingyas to Burma.³⁷ Operation Nagamin was followed in 1982 by the promulgation of the ‘Burma Citizenship Law’ of 1982 (“1982 Law”)³⁸ which repealed the 1948 Citizens Act. Section 3 of the 1982 Law provides that “Nationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period anterior to 1185 B.E., 1823 A.D. are Burma citizens”.

Although the provisions of section 3 of the 1982 Law is similar to that of section 3 of the 1948 Act, in that, both provisions do not explicitly include or exclude the Rohingya people as part of the ethnic groups in the country that are Burmese citizenships, the 1982 Law significantly adversely affected the Rohingyas in two ways: (a) it replaced the group “Arakanese” (which has a wider connotation and could accommodate other minorities in Arakan State) with the term “Rakhine”, which has been said to be “inextricably associated” with a Buddhist identity of the majority Buddhist population of Arakan state,³⁹ and (b) the 1982 Law also does not contain any equivalent of section 4(2) of the repealed 1948 Citizens Act. Rather Section 4 of the 1982 Law provides that the “Council of State may decide whether any ethnic group is national or not”.

Successive Burmese regimes do not recognize the Rohingyas as an ethnic group indigenous to Arakan or as part of the “ethnic groups as have settled in any of the territories included within the State” under sections 3 and 4 of the 1982 Law. On the contrary, the official policy of the government is that the Rohingyas are ‘illegal immigrants’ who emigrated from Chittagong (in

³⁶ *Ibid.*

³⁷ *Ibid.*, see also Human Rights Watch, “Perilous Plight: Burma’s Rohingya take to the Seas” (May 2009), 6 [HRW 2009]; Amnesty 2004, *supra*, note 19, at 5.

³⁸ *Burma Citizenship Law* 1982, available online:

<http://www.refworld.org/docid/3ae6b4f71b.html> [accessed 15 May 2013].

³⁹ See Michael W. Charney, “Buddhism in Arakan: Theories and Historiography of the Religious Basis of Ethnonyms”, Paper presented at the Forgotten Kingdom of Arakan Workshop, 23 – 24 November 2005, Bangkok, 1, online: Kaladan Press Network <<http://www.kaladanpress.org/scholar-column-mainmenu-36/58-arakan-historical-seminar/718-buddhism-in-arakantheories-and-historiography-of-the-religious-basis-of-ethnonyms>>.

present Bangladesh) during the British colonial rule. Hence the Rohingyas are consistently referred to as “Bengali Muslims” or “Chittagonians” by the government and other ethnic groups in Burma, in order to emphasize their alleged Bengali origin.⁴⁰ However, in spite of not being regarded as Burmese citizens, the Rohingyas were allowed to participate in the 1990 ‘democratic election’ by the General Than Shwe-led military State Law and Order Restoration Council (SLORC).⁴¹ The election was won by Aung San Suu Kyi’s National League for Democracy Party (NLD) but SLORC refused to hand over power. The refusal sparked country-wide protests.⁴² A human rights agency report has observed that following the nation-wide protest, “SLORC needed a diversion: they chose the Rohingyas”.⁴³ Consequently, North Arakan State was heavily militarized with the establishment of the notorious Nay-Sat Kut-kwey Ye (NaSaKa), a border security force consisting of members of the police, Military Intelligence, riot police, customs officials, and the Immigration and Manpower Department.⁴⁴ The “intensification of oppressive tactics against the Rohingyas” by NaSaKa resulted in “a second mass exodus across the Burma-Bangladesh border.”⁴⁵ Between May 1991 and March 1992 about 270,000 Rohingyas sought refuge in the Cox’s Bazar region of Bangladesh. There were reported cases of summary executions, torture, forced labor, and rape of the Rohingyas by the NaSaKa.⁴⁶

In addition to NaSaKa’s activities, the Rohingyas also continue to suffer from unending sectarian violence between them and the majority Rakhine Buddhists in Arakan State. In June 2012, for example, deadly sectarian violence erupted in Arakan between the Rakhine Buddhists and Rohingya Muslims (as well as non-Rohingya Muslims). The violence broke out after reports

⁴⁰ See for example, Aye Chan, *supra*, note 17, at 397, HRW 2012, *supra*, note 17, at 5 – 6; U Khin Maung Saw, *The Rohingyas who are they? The Origin of the name “Rohingya”*, in Uta Gartner & Jens Lorenz, eds., *Tradition and Modernity in Myanmar: Proceedings of an International Conference Held in Berlin from May 7th to May 9th, 1993* (Muster, Hamburg: National Library, Germany, 1994) 89. *Contra*, Nurul Islam, *Rebuttal to Khin Maung Saw’s Misinformation on Rohingya*, online: ARNO <<http://www.rohingya.org/portal/index.php/scholars/65-nurul-islam-uk/292-rebuttal-to-u-khin-maung-saws-misinformation-on-rohingya.html>>.

⁴¹ ICHR Report, *supra*, note 17, at 26.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*; see also, Amnesty 2004, *supra*, note 19, at 5.

⁴⁶ Amnesty 2004, *supra*, note 19, at 5 – 6.

circulated that an Arakan woman was allegedly raped and killed by three Muslim men on 28 May 2012. By way of reprisal, a large group of Rakhine Buddhists stopped a bus and brutally killed 10 Muslims on board on 3 June 2012. Human Rights Watch confirmed that local police and soldiers stood by and watched the killings without intervening.⁴⁷ The notorious NaSaKa also took part in sectarian violence against the Rohingyas.⁴⁸ The 2012 sectarian violence resulted in several deaths, more than 5000 homes were completely burned down, and about 100,000 Rohingyas were displaced, leading to another Rohingya exodus.⁴⁹

Unfortunately, in most cases when the Rohingyas are forced to flee from Burma as a result of violence inflicted on them, they usually do so by poorly constructed and hastily built wooden rafts or small boats which frequently capsize and cause several deaths at sea.⁵⁰ Even when some of the rafts are lucky enough to make it to the shores of neighbouring countries (usually Thailand or Bangladesh), which are themselves seemingly overwhelmed by the continued high influx of Rohingya refugees, the fleeing Rohingyas are often subjected to various forms of inhuman and degrading treatments. An example of such inhuman and degrading treatment is the much publicized ‘boat people’ incident of January 2009 when the Thai Army/Navy arrested all the fleeing Rohingyas onboard such boats, beat them up and towed the boats back into the sea; ostensibly for the boat occupants to die in the sea.⁵¹

⁴⁷ See HRW 2012, *supra*, note 17, at 1.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, 1 – 5; see also International Crisis Group, “Myanmar: Storm Clouds on the Horizon” Asia Report No. 238, 12 November 2012, 1 – 3, online: Crisis Group <<http://www.crisisgroup.org/~media/Files/asia/south-east-asia/burma-myanmar/238-myanmar-storm-clouds-on-the-horizon.pdf>> [ICR 2012].

⁵⁰ A recent UN report indicates that a boat carrying about 200 fleeing Rohingyas from Burma capsized on Monday, 13 May 2013 with virtually all the people on board. See for example, ABC News “Boats Carrying Fleeing Rohingya Minority Capsize”, 14 May 2013, online: ABC News <http://abcnews.go.com/International/wireStory/boats-carrying-fleeing-rohingya-muslims-capsize-19177184#.UZPSkMoV_3k>; Jethro Mullen & Brian Walker, “Boats Carrying Scores of Rohingya Capsize in Myanmar, UN Says” CNN News 14 May 2013, online: CNN <<http://www.cnn.com/2013/05/14/world/asia/myanmar-boats-capsize>>.

⁵¹ See for example: ICHR Report, *supra*, note 17, at 15; HRW 2009, *supra*, note 37, at 2 – 4; UNHCR, “UNHCR concern at reports of shooting involving Rohingya boat people” Briefing Notes, 15 March 2013, online: UNHCR <<http://www.unhcr.org/5143076c9.html>>; Human Rights Watch, “Thailand: Investigate Departure of Rohingya ‘Boat People’” (News February 21,

Although recent developments in Burma tend to suggest that there is a general improvement in the human rights situation in the country, there is presently no improvement in the Rohingyas' situation.⁵² First, they are still not regarded as Burmese citizens by the present government.⁵³ Second, they are still victims of mass executions, arrests, forced labor, and rape, such that a 2013 Human Rights Watch report concludes that "the criminal acts committed against the Rohingya and Kaman Muslim communities in Arakan State beginning in June 2012 amount to crimes against humanity carried out as part of a campaign of ethnic cleansing".⁵⁴ The report also accused the Burmese government of complicity in the "systematic ethnic cleansing" of the Rohingyas.⁵⁵ Another report states that a "slow-burning genocide" is being carried out against them.⁵⁶ Third, there are also several reports of repeated racial abuse against the Rohingyas. For example, a Human Rights Watch Report notes that the treatments meted to the Rohingyas "are at times married to outright racism".⁵⁷ The report also observes that "South Asians are derogatorily referred to as *kala* (foreigner) in Burma, but the Rohingya often are viewed as beneath even this level of disdain".⁵⁸ There is also a February 2009 letter from the Burmese Consul-General in Hong Kong, Ye Myint Aung, to his fellow heads of mission where he said:

2011) online: HRW <<http://www.hrw.org/news/2011/02/21/thailand-investigate-departure-rohingya-boat-people>>.

⁵² See for example, Human Rights Watch, "'All You Can Do is Pray' Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State" April 2013 Report, online: HRW <http://www.hrw.org/sites/default/files/reports/burma0413webwcover_0.pdf> [HRW 2013].

⁵³ Following the recent sectarian violence, the Burmese President, Thein Sein, recently told the UNHCR that "the solution to ethnic enmity in Myanmar's western Rakhine state was to either send the Rohingya to a third country or have the UNHCR look after them". The UNHCR rejected the call to resettle the Rohingya. See Huffington Post, "UN refugee chief rejects call to resettle Rohingya", (12 July 2012), online: Huffington <<http://www.huffingtonpost.com/huffwires/20120712/as-myanmar-sectarian-unrest/>>.

⁵⁴ HRW 2013, *supra*, note 52, at 11.

⁵⁵ *Ibid*, 24 – 46, 117 – 130.

⁵⁶ See ALTSEAN-Burma, "Rohingyas and Muslims in Arakan State: A Slow-Burning Genocide" (2006) 1, online: ALTSEAN <<http://www.altsean.org/Docs/PDF%20Format/Thematic%20Briefers/Rohingya%20And%20Muslims%20In%20Arakan%20State%20-%20Slow-Burning%20Genocide.pdf>>.

⁵⁷ HRW 2009, *supra*, note 37, at 7.

⁵⁸ *Ibid*.

In reality, Rohingya are neither ‘Myanmar People’ nor Myanmar’s ethnic group. You will see in the photos that their complexion is ‘dark brown’. The complexion of Myanmar people is fair and soft, good looking as well... They are as ugly as ogres.⁵⁹

Thus, on the whole, the Rohingyas have been rightly described by the British Broadcasting Service (BBC) as “the world’s least wanted and most persecuted people”⁶⁰ and as reportedly admitted recently (2013) by Burma’s information minister, U Ang Kyi, “the statelessness of its Rohingya Muslim minority is a key cause of its suffering in the country”.⁶¹

2.1.1 The Rohingyas’ Dilemma

The greatest dilemma of the Rohingyas seems to be their rejection on all sides. On one hand, the Burmese government denied them citizenship because they are allegedly Bengalis from Bangladesh and therefore have no place in Burma, and on the other hand, the Bangladeshi authorities do not also accept them as citizens – the Bangladeshi authorities regard Rohingya refugees as Burmese and have repatriated thousands of Rohingyas to Burma. This dilemma is well captured in the testimony of Hossain, who was repatriated to Burma in 2005, but he returned to Bangladesh after finding out that his land was “occupied” by the Rakhine Buddhists. According to him:

The Burmese government says we’re Bangladeshi, but the Arakan is the only home we know. My father was born in Arakan and so was my grandfather. The Bangladesh

⁵⁹ Letter from Ye Myint Aung, Consul General of Myanmar in Hong Kong, to heads of Mission, Consul Corps, Hong Kong and Macau SAR, February 9, 2009, cited in HRW 2009, *supra*, note 37, at 7.

⁶⁰ Mark Dummett, “Bangladesh accused of ‘crackdown’ on Rohingya refugees”, BBC News (18 February 2010), online: BBC <<http://news.bbc.co.uk/2/hi/8521280.stm>> See also Akbar Ahmed & Harrison Akins, “Little help for the persecuted Rohingya of Burma”, Guardian (1 December 2011), online: Guardian <<http://www.guardian.co.uk/commentisfree/belief/2011/dec/01/rohingya-burma>>.

⁶¹ Dean Nelson, “Burma Considers Citizenship for Rohingya Muslims”, Telegraph 1 Nov. 2012, online: Telegraph <<http://www.telegraph.co.uk/news/worldnews/asia/burmayanmar/9648329/Burma-considers-citizenship-for-Rohingya-Muslims.html>>.

government says we're illegal migrants. But we didn't enter Bangladesh secretly to work. We came to save ourselves and our families.⁶²

The second dilemma relates to a general apathy on the part of the international community to intervene in the nationality travails of the stateless Rohingyas, despite being aware of their plight since 1992, when the United Nations General Assembly (UNGA) passed a Resolution which states that it was “deeply concerned at the continuing problem of large numbers of refugees from Myanmar in neighboring countries, including the almost 265,000 Myanmar Rohingya refugees in Bangladesh”,⁶³ and was also “gravely concerned” about the “oppressive measures directed in particular against ethnic and religious minorities” by the Burmese (military) government.⁶⁴ These ‘concerns’ influenced the imposition of diplomatic and economic sanctions on the Burmese government by the international community. However, following the recent emergence of Nobel Laureate and pro-democracy icon, Aung San Suu Kyi, as a member of parliament, the United States, European Union, and Canada have all lifted or suspended the decades-long sanctions imposed on the country, despite concerns expressed by various human rights organizations that the nationality travails of the Rohingyas have remained unresolved.⁶⁵ In lifting the sanctions, without first addressing the nationality travails of the Rohingyas, the international community seems to have given Burma a clean bill of health despite its non-readiness to reverse or address the denationalization of the Rohingyas. Thus, Burma’s celebrated return to democratic rule may not resolve the Rohingyas’ nationality travails.⁶⁶

⁶² Syed Zain Al-Mahmood, “Burma's Rohingya refugees find little respite in Bangladesh” *Guardian* 29 June 2012, online: *Guardian* <<http://www.guardian.co.uk/global-development/2012/jun/29/burma-rohingya-refugees-bangladesh>>.

⁶³ UNGA, Situation in Myanmar, A/RES/47/144 (December 1992) [mimeo general], 9th preamble.

⁶⁴ *Ibid*, at seventh preambular paragraph.

⁶⁵ See ICR 2012, *supra*, note 49, at 12 – 14.

⁶⁶ Especially in view of emerging reports which suggest that Aung San Suu Kyi, as well as other pro-democracy activists, does not consider the Rohingyas as Burmese citizens. See for example, HRW 2012, *supra*, at 7; see also Simon Roughneen, “Rohingya Appeal to Suu Kyi” *The Irrawaddy* (24 May 24 2012), online: *Irrawaddy* <<http://www.irrawaddy.org/archives/4987>>.

2.2. Kuwaiti Bidoons

The term “Bidoon”⁶⁷ is from the Arabic phrase *bidoon jinsiyya*, which literally means “without nationality” or “without citizenship”. It is different from “Bedouin”, which is from the Arabic word *badawi*, (nomad) or *badu* (nomads). The term (*bidoon jinsiyya*) was originally an official designation for anyone whose qualification for Kuwaiti citizenship was in doubt, but it has now been officially replaced with such terms like “Non-Kuwaiti” or “Undetermined nationality”.⁶⁸

The origin of the Bidoons is also disputed. Some literature contend that the Bidoons are a heterogeneous group consisting of a substantial number of people (the majority of) who were born and had lived all their lives in Kuwait.⁶⁹ Others contend that the Bidoons are descendants of indigenous Bedouin tribes (nomads) who lived in the Northern parts of Arabia for centuries and had moved freely across present day borders of Syria, Iraq, Kuwait, Jordan and Saudi Arabia.⁷⁰ At the other extreme is the Kuwaiti government’s contention that the Bidoons are foreigners who have concealed their real nationality in order to claim Kuwaiti citizenship.⁷¹ These three

⁶⁷ In Kuwaiti usage, *bidoon* is used as a singular or plural noun, but many English language texts use “Bidoon” for the singular and “Bidoons” for the plural. Some texts also use the alternative transliterations “Bidun”, “Bedoon”, “Bedoun” or “bidoun”. This thesis will use “Bidoon” and “Bidoons” for singular and plural respectively.

⁶⁸ See generally, Human Rights Watch, “A Victory Turned Sour: Human Rights in Kuwait Since Liberation” (Middle East Watch, September 1991), 50-54, online: HRW <<http://www.hrw.org/reports/1991/09/01/victory-turned-sour-human-rights-kuwait-liberation>> [HRW 1991]; Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Kluwer Law International, 1995), 87 – 92 [Henckaerts]; Open Society Institute & Refugees International, “Without Citizenship; Statelessness, Discrimination and Repression in Kuwait” (May 2011), 2, online: UNHCR <<http://www.refworld.org/docid/4dd205b62.html>> [OSI, *Without Nationality*]; Human Rights Watch, “The Bedoons of Kuwait: Citizens without Citizenship” (Middle East, August 1995) 10, online: HRW <<http://www.hrw.org/reports/1995/Kuwait.htm>> [HRW 1995].

⁶⁹ See HRW 1991, *supra*, note 68, at 51. See also, HRW 1995, *supra*, note 68, at 10.

⁷⁰ See for example, Abbas Shiblak, “Arabia’s Bidoon” in Brad K Blitz & Maureen Lynch, eds., *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* (Cheltenham-UK: Edward Elgar, 2011) 172, at 174 [Shiblak]; Human Rights Watch, “Prisoners of the Past: Kuwaiti Bidun and the Burden of Statelessness” (2011) 12 – 13, online: HRW <<http://www.hrw.org/sites/default/files/reports/kuwait0611WebInside.pdf>> [HRW 2011].

⁷¹ See for example, HRW 1991, *supra*, note 68, at 51; HRW 1995, *supra*, note 68, at 10. See also Human Rights Watch, “Response of Kuwaiti Government to Human Rights Watch” (2011), 2, online: HRW

positions seem to have been reflected in a 2011 Human Rights Watch report which states that today's Bidoon population originates from three different categories: (a) those who claim citizenship under Kuwait's Nationality Law, but whose ancestors failed to apply or lacked necessary documentation at the time of Kuwait's independence. These are the descendants of nomadic clans that regularly traversed the borders of modern day Gulf states but settled permanently in Kuwait prior to independence. (b) Former citizens of other Arab states (such as Iraq, Syria, and Jordan), and their descendents, who came to Kuwait in the 1960s and 70s to work in Kuwait's army and police force. The Kuwaiti government preferred to register them as Bidoons rather than to reveal this politically sensitive recruitment policy. Some of these migrants reportedly settled in Kuwait with their families and never left. (c) Individuals born to Kuwaiti mothers and Bidoon fathers.⁷² For the purpose of this thesis, the Bidoons refer to those that fall under the first category identified by the 2011 Human Rights Report, namely, the descendants of the nomadic Bedouin tribes.

Kuwaiti citizenship is regulated by the 1959 Nationality Law of Kuwait,⁷³ which defines Kuwaiti nationals as persons who were settled in Kuwait prior to 1920 and maintain normal residence there until the date of publication (1959).⁷⁴ This law requires proof of residence in Kuwait in order to be considered a Kuwaiti national.⁷⁵ Some authors have identified the nomadic lifestyle of the Bedouin ancestors, illiteracy, and lack of effective means of communication as some of the factors that made the Bidoons unable to comply with the residency requirement.⁷⁶

<http://www.hrw.org/sites/default/files/reports/Response%20of%20the%20Kuwaiti%20Government%20to%20HRW_0.pdf>.

⁷² HRW 2011, *supra*, note 70, at 19.

⁷³ *Nationality Law* 1959, KWT 110, unofficial translation available online: UNHCR <<http://www.refworld.org/docid/3ae6b4ef1c.html>>.

⁷⁴ *Ibid*, Article 1.

⁷⁵ OSI, *Without Nationality*, *supra*, note 68, at 3.

⁷⁶ See HRW 1991, *supra*, note 68, at 51 ["sometimes they lack citizenship because a male ancestor neglected to apply for it when citizenship regulations were first enacted in 1959 in anticipation of independence in 1961"]. See also HRW 1995, *supra*, note 68, at 10; Shiblak, *supra*, note 70, at 174 – 175; OSI, *Without Nationality*, *supra*, note 68, at 4 – 5; Human Rights Watch, "Kuwait: Promises Betrayed: Denial of Rights of Bidun, Women, and Freedom of Expression" (2000) Volume 12, Number 2(E), Ch. 4 (Discrimination Based on Origin and Status: The Bidun), online: UNHCR <<http://www.hrw.org/reports/2000/kuwait/>> [*HRW 2000*].

Some reports suggest that despite not having fully complied with the requirement of citizenship under the Law, the Bidoons were generally regarded as lawful residents of Kuwait until the 1980s. According to Shiblak, for example, the Kuwaiti government not only “tolerated the presence of the Bidoon” it also “offered them financial incentive to settle and work in Kuwait due to the need for greater manpower following the discovery of oil.”⁷⁷ Unlike foreign residents and guest workers, they were also exempted from visa restrictions.⁷⁸ They also enjoyed full civil, social and economic rights, with access to government services like housing, medical care, education, work, etc. At a stage, the Bidoons reportedly accounted for over 90% of the Kuwaiti army and police, although they were mainly low ranking officers.⁷⁹

The Bidoons’ nationality travails commenced in the mid 1980s, following the Iran-Iraq war of 1980-1988 which reportedly created a “climate of fear and suspicion towards irregular residents, whether Bidoon or foreign workers.”⁸⁰ According to a Kuwaiti Scholar, “when Khomeini’s revolution swept across Iran and war broke out between Iran and Iraq, much of Kuwaitis’ concern for the country’s internal security found its concrete expression in the existence of the bidoons: their ambiguous status... provided a human pool into which Iraqi refugees, draft dodgers, and infiltrators... could easily blend after getting rid of their identity papers.”⁸¹ Thus, the Bidoons, who are mainly Shiites, were seen by the Kuwaiti government as Iranians and sometimes Iraqi supporters. By 1986, the Kuwaiti government began to apply the Alien Residence Act to the Bidoons, effectively stripping them of most of the rights they had enjoyed since independence and re-classifying them as “illegal residents”.⁸² This move was allegedly part of a ‘policy’ pursued by the then Minister of Interior, Shaikh Salem al-Sabah, and the ultimate

⁷⁷ Shiblak, *supra*, note 70, at 175.

⁷⁸ *Ibid*, citing Al-Anezi, R.H, *The Residency Status of the Bidoon in International Law* [Kuwait] (Kuwait, Al-Qertas 1994).

⁷⁹ *Ibid*, see also HRW 1995, note 68, at 17.

⁸⁰ *Ibid*.

⁸¹ Anh Nga Longva, *Walls Built on Sand: Migration, Exclusion, and Society in Kuwait* (Oxford: Westview, 1997), 47 – cited in HRW 2011, *supra*, note 70, at 13 – 14.

⁸² This was in spite of Kuwaiti Appeals Court decision in 1988 which held that because the Bidoon are not considered nationals by any state, Bidoon residents could not be considered “aliens” in terms of the Alien Residence Act and thus could not be deported. This decision was largely ignored. See OSI, *Without Nationality*, *supra*, note 68, at 5.

aim of the policy was “to drive [B]idoon out of the country”.⁸³ The Bidoons were also suspected of involvement in the attempted assassination of the Emir in 1986.⁸⁴

Things got worse for the Bidoons after the Iraqi invasion of Kuwait and the attendant first Gulf War. According to reports, there were an estimated 250,000 Bidoons in Kuwait prior to the 1990 Iraqi invasion; the figure dropped to about 100,000 after the invasion.⁸⁵ The drastic decline was due to the fact that they were accused of supporting the Iraqi during the Iraqi invasion.⁸⁶ During the Iraqi invasion, the Iraqi occupation authorities reportedly “ordered” the Bidoons to join the Popular Army (a pro-Iraq militia) and those who did not join risked imprisonment and possible execution. Consequently, some of them joined the militia, but others did not.⁸⁷ A large number of Bidoons actually served in the Kuwaiti military during the Iraqi invasion, and it has been estimated that as many as one third of the people who were killed by the Iraqi army were Bidoons.⁸⁸ Notwithstanding the fact that many Bidoons fought on the side of the Kuwaiti government, many Kuwaitis still viewed the Bidoons as Iraqi accomplices and this led to reprisal attacks against them. The attacks resulted in hundreds of deaths and disappearances after liberation of Kuwait by the Allied Forces in late February 1991.⁸⁹ Those who fled to Iraq during the invasion were also not allowed to return, and those who stayed were threatened with jail or deportation unless they proved their identity.⁹⁰ Further to these reprisals, the term “Bidoon” was replaced, first with “non-Kuwait” and then with the official label “illegal residents” in official documents. With the new designation (“illegal residents”), the Bidoons no longer had right of

⁸³ Without Nationality, *supra*, note 68, at 5.

⁸⁴ Shiblak, *supra*, note 70, at 177.

⁸⁵ *Ibid*, at 172.

⁸⁶ *Ibid*, at 177.

⁸⁷ See for example, HRW 1995, *supra*, note 68, at 23 – 24; OSI, Without Nationality, *supra*, note 68, at 6.

⁸⁸ *Ibid*.

⁸⁹ Shiblak, *supra*, note 70, at 177; OSI, Without Nationality, *supra*, note 68, at 6.

⁹⁰ *Ibid*. See also Wafaa Adnan Alaradi, *The Dilemma of Nationality A Comparative Case Study: The Case of the Bedoon in Kuwait and the Case of the Bihari In Bangladesh*, (Masters of Arts in Political Science Thesis, University of South Carolina, 2008) [unpublished], available online at <<http://gradworks.umi.com/1459919.pdf>>: the author suggested that the Bidoon fled to Iraq in order to escape NATO bombardment because they do not need passport to cross into Iraq unlike Saudi Arabia (pp. 21 – 22).

employment and any firm that employed them faced a government-imposed fine.⁹¹ Their present travail is summed up in the Parliamentary Committee 2005 report which states that:

The Kuwaiti government exerts security, economic and social pressures on more than 120,000 Bidoons to force them to either reveal their nationalities or sign affidavit admitting to foreign nationality for modification of their legality status and for depriving Bidoons of the freedom of movement and freedom to travel except on rare occasions. Bidoons are not employed by the public sector and their employment in the private sector has been restricted. They are not allowed to get driving licenses or any other form of identification from government offices. Bidoons do not have rights of possession of property or even cars. They are also deprived of any right of possession of personal identity or anything to prove their legal residence. They cannot register births, marriages, divorces and death. It is in breach of the law for a Bidoon to get married without official approval. All these practices are considered as contradicting Islamic Sharia law and violating human rights and international conventions, which Kuwait is obliged to follow as it has signed.⁹²

In recent times, the political landscape of the Arab world/Middle East has changed following the *Arab Spring*.⁹³ The Bidoons, who are perhaps inspired by the success of the *Arab Spring* in other countries, have held a number of public demonstrations against the Kuwaiti government since early 2011. But, unlike their counterparts in the *Arab Spring*, all the Bidoons are demanding from the Kuwaiti government is ‘citizenship’ and not change of government. The first Bidoons’ demonstrations for nationality rights took place on February 18, 2011.⁹⁴ As a possible ‘damage control’ and to prevent the protests from spiraling out of control, the Kuwaiti government reportedly promised some reforms, including access to a few basic rights for the Bidoons.⁹⁵ The Kuwaiti parliament also held a two-hour discussion on the Bidoons on March 8, 2011, but it unfortunately passed a resolution to postpone the discussion in favour of debating “issues that concern Kuwaitis”.⁹⁶ Following the failure of the Kuwaiti government to take any concrete measure taken to resolve their demands for citizenship, the Bidoons took to the streets again in

⁹¹ Shiblak, *supra*, note 70, at 178 – 179.

⁹² Parliamentary Committee for Defending Human Rights in Kuwait, June 2005, 9th session-quoted in Shiblak, *supra*, note 70, at 178.

⁹³ The *Arab Spring* has made the Monarchs of Morocco, Jordan, Bahrain, Kuwait, and Saudi Arabia to concede political reforms in order to avert regime collapse. It has also led to the collapse of long-standing dictatorial regimes in Tunisia, Egypt, Libya and Yemen.

⁹⁴ OSI, Without Nationality, *supra*, note 68, at 12.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

protests from March 2011 to May 2012. The protests resulted in several arrests and other forms of brutality against the Bidoons from the police.⁹⁷ However, the Bidoons' protests and the brutal police crackdown have not attracted any response from the international community.⁹⁸

2.2.1 The Bidoons' Dilemma

Like the Rohingyas, the Bidoon also face the dilemma of rejection by their home state (Kuwait). There is also failure on the part of the international community to respond to their plights as evident in the international silence that greeted their public demonstrations for citizenship during the *Arab Spring*.⁹⁹ However, unlike the situation of the Rohingyas, recent events indicate that there are some rays of hope for the Bidoons in Kuwait. This is because, on 20 March 2013, the Kuwaiti parliament passed a bill to grant citizenship to up to 4,000 "foreigners". The legislation was amended to say a "maximum of 4,000 foreigners" from an original "at least 4,000 stateless people" or "Bidoons", amid pressure from ministers.¹⁰⁰ In order to take effect, the legislation must be signed by the Emir of Kuwait and there is presently no indication that bill has been

⁹⁷ "Riot Police Violently Disperse Bedoon Protest in Kuwait's Freedom Square", *Jadaliyya* (1 May, 2012), online: *Jadaliyya* <<http://www.jadaliyya.com/pages/index/5332/riot-police-violently-disperse-bedoon-protest-in-k>>; "Securitymen arrest 14 Bedoun protesters Court postpones hearing against 68 demonstrators to May 5", *Arab Times* (2 May, 2012), Online: *Arab Times*

<<http://www.arabtimesonline.com/RSS/tabid/69/smld/414/ArticleID/182740/t/Securitymen-arrest-14-Bedoun-protesters/Default.aspx>>; "Kuwait police disperse 'stateless' protesters", *Aljazeera News*, 1 May 2012, online: *Aljazeera* <<http://www.aljazeera.com/news/middleeast/2012/05/20125116361752101.html>>; "Kuwait police crackdown on stateless protests", *Aljazeera News* (14 January, 2012), online: *Aljazeera* <<http://www.aljazeera.com/news/middleeast/2012/01/2012011420266902157.html>>; "Kuwaiti riot police disperse protesters", *Aljazeera News* (16 December, 2011), online: *Aljazeera* <<http://www.aljazeera.com/news/middleeast/2011/12/20111216133237617703.html>>.

⁹⁸ See OSI, Without Nationality, *supra*, note 68, at 12.

⁹⁹ See Refugee International (RI), "Kuwait: Bidoon Nationality Demands can't be Silenced" (Field Report, 6 March 2012), online: RI <http://www.refugeesinternational.org/sites/default/files/030512_Kuwait_Bidoun_Nationality%20with%20letterhead.pdf>.

¹⁰⁰ See "Kuwait MPs pass law to naturalise 4,000 stateless Bidun" BBC News (20 March 2013), online: BBC <<http://www.bbc.co.uk/news/world-middle-east-21857431>>; Claire Valdini, "4,000 bidoons to be given Kuwaiti citizenship" *Arabian Business* (21 March 2013), online: *Arabian Business* <<http://www.arabianbusiness.com/4-000-bidoons-be-given-kuwaiti-citizenship--494914.html>>.

signed into law. Notwithstanding the status of the bill, Amnesty International has described the Kuwaiti parliament's decision to grant citizenship to 4,000 “foreigners” as “a step in the right direction” though it concedes that “the Kuwaiti government must intensify its efforts to find a lasting solution for all the [Bidoons] in the country.”¹⁰¹ Critics have, however, dismissed the bill as a “diversion”. For example, a Kuwaiti activist has retorted that:

[This bill] is just a way of keeping people busy talking about a mere 4,000 and diverting the discussion from the real problems... There are around 120,000 Bedoons living in Kuwait, spanning over three generations. If you're going to nationalize 4,000 a year, how long will it take with their growing population? And what are the ones waiting supposed to do?”¹⁰²

With the passage of the recent bill, it is arguable that the Bidoons are in a better position than their stateless Rohingyas counterpart. Again, the Bidoons also seem to have the ability to move freely within most states in the Gulf.

2.3 “Non-citizens” of Latvia

The “Non-citizens” of Latvia are also without nationality due to the applicable Latvian Citizenship Law. They are mainly ethnic Russians who migrated to Latvia during Soviet occupation which began in 1940. Like most other Latvians, they were also citizens of the former Soviet Union who resided in Latvia before and after its independence in 1990.¹⁰³

¹⁰¹ “Kuwait: Small step forward for Bidun rights as 4,000 'foreigners' granted citizenship” Amnesty International (News, 21 March 2013), online: Amnesty International <<http://www.amnesty.org/en/news/kuwait-small-step-forward-bidun-rights-4000-foreigners-granted-citizenship-2013-03-21>>.

¹⁰² Yumna Marwan, “Activists: Kuwait's naturalization bill a ‘diversion’” *Al-Akhbar* (20 March 2013), online: Al-Akhabar <<http://english.al-akhbar.com/node/15300>>.

¹⁰³ See generally, Kristine Kruma, *Country Report: Latvia*, Research for the EUDO Citizenship Observatory Country Reports (San Domenico di Fiesole- Italy: European University Institute, 2013), 1 – 2, online: European University Institute <<http://eudo-citizenship.eu/country-profiles/?country=Latvia>> [Kruma]; Vadim Poleshchuk, ed., *Chance to Survive: Minority Rights in Estonia and Latvia* (Moscow: Foundation for Historical Outlook, 2009) 144 – 178 [Poleshchuk]; Latvian Human Rights Committee, “Citizens of Non-existent State: The long-term Phenomenon of Mass Statelessness in Latvia”, 2ed, (2011 Report), available online at <http://www.aedh.eu/plugins/fckeditor/userfiles/file/Discriminations%20et%20droits%20des%20minorit%C3%A9s/CITIZENS_OF_A_NON_EXISTENT_STATE.pdf> [LHRC 2011]; Latvian Human Rights Committee, “The Last Prisoners of the Cold War: The Stateless People of Latvia

Unlike most former USSR Republics, which adopted registration of residence as sufficient basis for automatic citizenship (the ‘zero-option’) after the dissolution of the Soviet Union and restoration of independence, Latvia adopted a citizenship policy which is based on the principle of state continuity – as a result of its claim that Soviet occupation was illegal and that Latvia had never been part of the USSR *de jure*.¹⁰⁴ In furtherance of this principle, the Latvia Parliament, on 15 October 1991, adopted a resolution entitled “On the Renewal of the Rights of the Citizens of the Republic of Latvia and on the Fundamental Principles of Naturalization”. The resolution granted Latvian citizenship only to those residents who were citizens up to 17 June 1940 (the beginning of Soviet occupation) as well as their descendants.¹⁰⁵ According to the Latvia Human Rights Committee, by this act, “[o]ne third of the population of Latvia were deprived of all political rights in spite of possessing these rights at the time of the previous elections. This is a unique case in parliamentary history: a parliament deprived its own voters of citizenship and, thus, voting rights.”¹⁰⁶ Those who do not qualify for citizenship under the resolution were left in limbo for a long time.¹⁰⁷

The Citizenship Law, which was adopted in 1994, cemented the provisions of the 1991 resolution. It, however, also provides for citizenship by naturalization in an attempt to resolve the status of those who were not entitled to citizenship under the 1991 resolution.¹⁰⁸ The Law provides that in order to become a naturalized Latvian citizen, a person must have lived in Latvia for five years and have command of the Latvian language and basic knowledge of Latvian history and society.¹⁰⁹ The Law, however, excludes people with employment links with the former USSR from naturalization. This includes those who served in the armed forces, secret service, police, and were members of the communist party.¹¹⁰ This exclusion affects a large

in their own Words” (2006 Report), online: LHRC
<http://www.lhrc.lv/biblioteka/last_prisoners.pdf>.

¹⁰⁴ Kruma, *supra*, note 103, at 2.

¹⁰⁵ *Ibid.*

¹⁰⁶ LHRC 2011, *supra*, note 103, at 4.

¹⁰⁷ *Ibid.*

¹⁰⁸ Kruma, *supra*, note 103, at 1 – 5, the author observed that this was due to international pressure from various Western countries as well as international organizations, most notably OSCE, the Council of Europe, EU and NATO.

¹⁰⁹ Section 12, Citizenship Law, 1994.

¹¹⁰ *Ibid.*, Section 11.

number of people, especially the older generations, who were born in Latvia or had lived in the country for decades, but can only speak Russian (which was then an official language of the state as part of the Soviet Union), and were also former employees of the Soviet Union.¹¹¹ Those affected by the exclusion were between 700,000 and 900,000 (representing about 32% of Latvian population at independence).¹¹²

In 1995, the Latvian parliament passed the “On the Status of those Former USSR Citizens who do not have the Citizenship of Latvia or that of any Other State” Law¹¹³ in a further attempt to resolve the status of those not entitled to its citizenship under the 1994 Citizenship Law.¹¹⁴ The law confers a “Non-citizens” status on citizens of the former Soviet Union who have resided in Latvia for at least ten years.¹¹⁵ Subject to complying with the Latvian language requirement, they were also entitled to apply for Latvian citizenship.¹¹⁶ However, a vast majority of affected people emigrated to acquire foreign, mainly Russian, citizenship;¹¹⁷ hence, the number of the affected population has declined to about 400,000 (now representing about 17% of the total Latvian population).¹¹⁸

3.2.3.1 The Latvian ‘Non-citizens’ Dilemma

¹¹¹ In 2012, the country held a referendum in an unsuccessful attempt to make Russian language the second ‘official’ language. See generally Timothy Heleniak, “Latvia Looks West, But Legacy of Soviets Remains”, online: Migration Policy Institute <<http://www.migrationinformation.org/Profiles/display.cfm?ID=375>>; Aleks Tapinsh, “Russian language vote shows ethnic split in Latvia”, *Reuters*, 17 February 2012, Online: Reuters, <<http://www.reuters.com/article/2012/02/17/us-latvia-russia-vote-idUSTRE81G0AS20120217>>; BBC News, “Latvia rejects making Russian an official language” *BBC News*, 18 February 2012, online: BBC News <<http://www.bbc.co.uk/news/world-europe-17083397>>.

¹¹² LHRC 2011, *supra*, note 103, at 4. See also Poleshchuk, *supra*, note 103, at 166 – 167.

¹¹³ *On the Status of those Former USSR Citizens who do not have the Citizenship of Latvia or that of any Other State Law 1995*.

¹¹⁴ See Kristine Kruma, *Naturalization Procedures for Immigrants Latvia*, Research for the EUDO Citizenship Observatory Country Reports (San Domenico di Fiesole- Italy: European University Institute, 2013), 2-3, online: European University Institute <<http://eudo-citizenship.eu/country-profiles/?country=Latvia>>.

¹¹⁵ *Ibid*, section 1.

¹¹⁶ Citizenship Law 1994, section 12.

¹¹⁷ Poleshchuk, *supra*, note 103, at 171.

¹¹⁸ *Ibid*. See also LHRC 2011, *supra*, note 103, at 6.

As noted above, a large majority of the Latvian ‘Non-citizens’ are ethnic Russians. They are generally seen as “puppets of Moscow”.¹¹⁹ Like the Rohingyas and Bidoon, they are generally perceived as disloyal groups, deserving of no part in their home state. They have also engaged in public demonstrations for citizenship but such demonstration is generally ignored by the international community and mainstream (western) media.¹²⁰

However, they are not as helpless as the Rohingyas, or even the Bidoons, mainly due to the fact that Latvia is a European country and a party to several relevant international instruments relating to nationality. For example, under the 1995 “Law on the Status of those Former USSR Citizens who do not have the Citizenship of Latvia or that of any Other State”, they are entitled to most rights other Latvians enjoy, apart from the right to vote and restrictions on some kinds of employments.¹²¹ They are entitled to a special passport which grants them the special status of belonging to the state, thus giving them the constitutional right to return.¹²² They cannot be deported, unlike the case with third-country nationals.¹²³ They also enjoy the diplomatic protection of Latvia.¹²⁴ They also tend to have a choice to take up Russian citizenship, especially in the light of recent reports which show that the Russian Government has taken both legislative and executive steps to simplify the procedure for granting of Russian citizenship to direct descendants of nationals of the Russian Empire or the Soviet Union who now live abroad.¹²⁵

¹¹⁹ See generally, Tomas Malmlof, *The Russian Population of Latvia- Puppets of Moscow?* (Stockholm: FOI- Swedish Defence Research Agency, 2006); Agnia Grigas, *Legacies, Coercion and Soft Power: Russian Influence in the Baltic States* (London-UK: The Royal Institute of International Affairs, 2012).

¹²⁰ See LHRC 2011, *supra*, note 103, at 3 – 6.

¹²¹ See generally, LHRC 2011, *supra*, note 103, at 3.

¹²² Kruma, *supra*, note 103, at 8.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ See Alexey Kudenko, “Russia may fast-track citizenship for imperial descendants” RIA Novosti (30 January 2013), online: RIA <<http://rt.com/politics/empire-russian-citizenship-passport-067/>>; Lyudmila Alexandrova, “Ethnic Russians will soon find it easier to get Russian citizenship” Itar-Tass (23 January 2013), online: Itar-Tass <<http://www.itar-tass.com/en/c39/629063.html>>; Alexander Bratersky, “Putin Endorses Eased Citizenship Requirements” The Moscow Times (13 December 2012), online: The Moscow Times <<http://www.themoscowtimes.com/news/article/putin-endorses-eased-citizenship-requirements/473010.html>>.

4.0 CONCLUSION

A common thread that runs through the factual situations of the Rohingyas, Bidoons and the Non-Citizens of Latvia is that their respective countries excluded them as a group forming part of its membership, mainly because they are seen as foreigners and disloyal, even though they have settled or resided in their respective countries for decades.¹²⁶ They, thus, occupy the unenviable position of not being a part of any organized political community. The fact that they are without nationality in the face of an internationally recognized ‘right to nationality’ raises questions regarding the ability of present international human rights law to protect their ‘right to nationality’. This inability seems to be strengthened by a general apathy towards right to nationality of stateless groups, as evident by the international response to the Rohingyas, Bidoon, and Latvian ‘Non-citizens’ nationality travails.

The above-mentioned general apathy raises a question of whether there is anything intrinsic to the ‘right to nationality’ that accounts for the lack of interest on the part of the international community. In determining this question, it is necessary to examine the extent to which the right to nationality conflicts with another fundamental principle of international law, namely, the sovereign power of states to regulate and determine who should be their nationals. This conflict is the major focus of this thesis.

¹²⁶ The question whether these stateless groups are indeed foreigners – that is, whether the Rohingyas are really Bengalis (from Bangladesh) or whether the Bidoons are Iranians or Iraqis, or whether the Latvia ‘Non-citizens’ are ‘puppets of Moscow’, and consequently whether they are justifiably excluded from the citizenship of their respective countries – is not part of the focus of this thesis.

CHAPTER TWO

NATIONALITY: FROM *NATIO* TO ‘HUMAN RIGHT’

*There is no greater right or privilege than nationality; and because of its vast importance, its acquisition and its loss should be clearly defined and stated. There should be for every person a nationality – a single and exclusive nationality – and there should be no stateless person in a world governed by law.*¹

Being a national of a particular country or owing allegiance to a particular sovereign always has significant socio-political implications at the local and inter-state level. It has been known to be the basis for discrimination, and the basis for conferring or depriving someone of some particular benefits. For example, ancient Jews classified all non-Jews as ‘Gentiles’, the Greeks classified non-Greek as ‘barbarians’, and the Romans also classified non-Romans as ‘barbarians’. These classifications were not merely pejorative; there were significant socio-legal disadvantages attached to such terms.

The biblical account of an incidence involving Paul the Apostle clearly depicts some of the privileges attached to being a Roman ‘citizen’ in ancient Roman Empire.² As recorded in the Bible, Apostle Paul, a Roman citizen of Jewish descent, was being lynched by a mob (comprised of fellow Jews) who suspected him of *desecrating* the Holy Temple by allowing a *Gentile* (Trophimus) to accompany him into the temple. He was rescued by some soldiers who later brought him before a military tribunal. During the proceedings, the presiding *chief captain* ordered Paul to be *examined by flogging* (tortured) in the course of interrogation. As the soldiers were ready to carry out the order, Paul, apparently knowledgeable about the importance of being a Roman citizen, asked one of the soldiers the following question: “is it legal for you to flog a Roman citizen who is uncondemned?”³ *Immediately* the soldier heard that, he *went* to the *chief captain* and said: “What are you about to do? This man is a Roman citizen.”⁴ Paul’s declaration

¹ James Brown Scott “Introduction” to Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* (New York: American University Graduate School, 1934) at ix.

² See generally, New Revised Standard Version Bible (Division of Christian Education of the National Council of the Churches of Christ in the United States of America, 1989), Acts 21: 26 – 22:30.

³ *Ibid*, Acts 22: 25.

⁴ *Ibid*, verse 27.

of his Roman citizenship changed his status; he was no longer subject to torture and he even received extra security for his life. The impact of his Roman citizenship was summed up in the letter by the *chief captain* to the Roman-appointed Governor, Felix, where he explained that “this man was seized by the Jews and was about to be killed by them, but *when I had learned that he was a Roman citizen*, I came with the guards and rescued him”.⁵ Invariably, Apostle Paul protected his *right to life* by the declaration of his Roman citizenship.

There is no doubt that even in today’s globalized world, being a national of a particular country still confers a wide range of benefits on individuals, especially in areas of international diplomacy or relations. However, as noted in chapter one, the Rohingyas, Bidoons and ‘Non-Citizens’ of Latvia are without nationality even in the face of Article 15 of the Universal Declaration on Human Rights (UDHR)⁶ which provides that “everyone has a right to nationality”. The purpose of this chapter is to examine the changing concept of nationality, statelessness, and the emergence of nationality as ‘human right’.

1.0 ‘NATIONALITY’ IN CONTEXT

Etymologically, the word “nationality” is derived from the Latin word *natio* which literally means to be born (of a people).⁷ The word *natio*, in ancient Rome, was understood to be a group of people “who belonged together in some way because of similarity of birth”.⁸ This was mainly due to the fact that “the members of a *natio* were born in the same city or the same tract of land”.⁹ The meaning of the word *natio* progressed, over the years, to include people who share common ancestry, values, and aspirations.¹⁰ Hence, contemporary definitions of “nation” connote “a people” or “group” who share common cultural values, heritage or history, territory

⁵ *Ibid*, (emphasis added).

⁶ G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) [*UDHR*].

⁷ Guido Zernatto & Alfonso G. Mistretta, “Nation: The History of a Word” (1944) 6 *The Review of Politics* 351.

⁸ *Ibid*.

⁹ *Ibid*, at 252.

¹⁰ *Ibid*, at 254 – 264.

or geographical origin, language and government.¹¹ However, the modern concept of nation has been traced to the Peace of Westphalia Treaty (1648) which gave birth to modern nation-state.¹² The compound term “nation-state” is now used in international relations to denote a sovereign entity, often without any reference to common characteristics of the people.¹³

Today, existing literature describes “nationality” in two senses. For example, Keating describes nationality in “a narrow, restricted sense to refer to citizenship of a state; and in a weaker sense to denote a broad cultural affiliation.”¹⁴ Seckler-Hudson also defines nationality in the “broadest” sense as “membership in a certain nation which is held together by definite common ethnic, physical, educational, religious or racial ties or characteristics” and in the “strict” sense as “the status of a natural person who is attached to a particular state by ties of allegiance.”¹⁵ However, most literature describes nationality only in the “strict” or “narrow” sense which denotes “a specific relationship between individual and state conferring mutual rights and duties.”¹⁶ It is also “the bond that unites individuals with a given state that identifies them as members of that entity, that enable them to claim its protection, and also subject them to the performance of such duties as their state may impose on them.”¹⁷

¹¹ See David Dudley Field, *Outlines of an International Code*, 2d ed (New York: Baker, Voorhis & Co, 1876), at 2; Pasquale Fiore, *Nouveau Droit International Public: Suivant Les Besoins de la Civilization Moderne*, translated by P. Pradier-Fodere (Paris: Auguste Durand & Pedone-Lauriel, 1868), at 118 – 119 [Fiore]; Henry L. Bretton, *International Relations in the Nuclear Age: One World, Difficult to Manage* (Albany: State University of New York Press, 1986), at 5; Anthony D. Smith, “Ethnic and Nation in the Modern World” (1983) 14:2 *Millennium* 128.

¹² Johannes M.M. Chan, “The Right to a Nationality as a Human Right; the Trend towards recognition” (1991) 12 *Human Rights Law Journal* 1 [Chan]; Ayse Kadioglu, “Denationalization of Citizenship? The Turkish Experience” (2007) 11 *Citizenship Studies* 283, at 284 [Kadioglu].

¹³ Michael Keating, *Plurinational Democracy* (Oxford: Oxford University Press, 2001), 6 – 7 [Keating].

¹⁴ *Ibid*, at 26.

¹⁵ Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* (New York: American University Graduate School, 1934) 6 – 7 [Seckler-Hudson]. See also Paul Weis, *Nationality and Statelessness in International Law* (Westport: Hyperion Press, 1979), 13 [Weis]; Gerbard von Glabn and James Larry Taulbee, *Law Among Nations: An Introduction to Public International Law*, 8th ed (New York: Pearson Education, 2007), 204 [Glabn & Taulbee].

¹⁶ Weis, *supra*, note 15, at 13.

¹⁷ Glabn & Taulbee, *supra*, note 15, at 204. See also Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law*, (Oxford: Oxford University Press, 2012), 43 [Kesby]; see also A.M.Boll, *Multiple Nationality and International Law* (Leiden: Martinus

1.1 Nationality and citizenship

Closely related to the concept of nationality is the word “citizenship”. There is no significant difference between the dictionary definitions of “nationality” and “citizenship”, as they describe the link between a person and a state; hence, most existing literature use both terms interchangeably.¹⁸ However, some scholars have drawn a distinction between the two terms. For example, according to Kesby, nationality “evolved from the medieval European concept of a ‘subject’ tied to territory and to a sovereign to whom allegiance was owed, [whereas] citizenship has its roots in the Greek and Roman idea of membership of the polis with its attendant rights and duties.”¹⁹ She also argues that “nationality relates to legal membership of a state for inter-state purposes. The rights of nationals within the state thus become a question of citizenship and beyond the scope of international law.”²⁰ Similarly, Weis argues that nationality pertains to the external aspect of state membership and citizenship to the international relationship between the individual and the state.²¹

A key element of the modern concept of nationality is the idea of a person coming under the protection or jurisdiction of a state, usually for the purpose of inter-state relations.²² There are two significant relevance of nationality in this context of the inter-state relations. First, it relates to the right, which states generally assert, of protecting citizens abroad or ensuring that citizens

Nijhoff, 2007), 61 – 69; Ian Brownlie, ‘The Relations of Nationality in Public International Law’ (1963) 39 BYIL 284, at 319.

¹⁸ See for example, Kadioglu, *supra*, note 12, at 284; Mirna Adjami & Julia Harrington, “The Scope and Content of Article 15 of the Universal Declaration of Human Rights” (2008) 27 Refugee Survey Quarterly 93 [Adjami & Harrington]; Article 2 of the European Convention on Nationality; Anne Peters, “Extraterritorial Naturalizations: Between the Human Rights to Nationality, State Sovereignty and Fair Principles of Jurisdiction” (2010) 53 German Yearbook of International Law 623, at 625.

¹⁹ Kesby, *supra*, note 17, at 43-44.

²⁰ *Ibid*, at 45.

²¹ Weis, *supra*, note 15, at 4 – 5.

²² Chan, *supra*, note 12, at 1; see also Philip Jessup, *A Modern Law of Nations: An Introduction* (NP: Archon Books, 1968), 68.

are not mistreated contrary to international law.²³ The second aspect relates to territorial integrity of the states. Here, nationality is linked with the territorial sovereignty of states to admit and expel (repatriate) aliens.²⁴ Usually, the power of a state to expel is contingent on a corresponding duty of other states to re-admit their nationals.²⁵

Thus, on the whole, the meaning of the term “nationality” has progressed from its original conception as *natio* (which ordinarily denotes a person being a “part” of a people), to Medieval Greek and Roman *Polis* (which suggests that the person is “part” of a city-state with rights and obligations), to the modern conception (which connotes the idea of a person belonging to a particular state or having reciprocal relationship with a sovereign state authority for the purpose of inter-state relations). It is necessary to bear in mind that this thesis is mainly concerned with the ‘modern conception’ of “nationality” in the strict or civic sense. The term “nationality” will be used interchangeably with “citizenship” in this thesis.

1.2 “Right” to Nationality

As observed in chapter one, this thesis takes the view that to have a *right* to something means to be *entitled* to *demand* for that thing.²⁶ Thus, for the purpose of this thesis, the “right” to nationality connotes the *right* or entitlement of every individual to *demand* to be part of a national group for the purpose of inter-state relations. It also connotes the right to *acquire* a

²³ See generally, Edwin M. Borchard, “Basic Elements of Diplomatic Protection of Citizens Abroad” (1913) 7 Am. J. Int’l L. 497; Elihu Root, “The Basis of Protection to Citizens Residing Abroad”, (1910) 4 Am. J. Int’l L. 517 – 528; Edwin M. Borchard, “The Protection of Citizens Abroad and Change of Original Nationality” (1933-1934) 43 Yale L. J. 359; Anthony D’Amato, “The Concept of Human Rights in International Law” (1982) 82 Columbia Law Review 1110 at 1125; Dinah L. Shelton, “An Introduction to the History of International Human Rights Law” (2007) *GWU Legal Studies Research Paper* (No. 346), online: SSRN <<http://dx.doi.org/10.2139/ssrn.1010489>>.

²⁴ See Alice Edwards & Carla Ferstman, “Humanising Non-citizens: the Convergence of Human Rights and Human Security” in Alice Edwards & Carla Ferstman, eds., *Human Security and Non-Citizens: Law, Policy and National Affairs* (Cambridge: Cambridge University Press, 2010) 3, at 7.

²⁵ See generally Weis, *supra*, note 15, at 45 – 52.

²⁶ See pages 2 – 3 above.

nationality. This right has been described as the “right to belong to some kind of organized community”,²⁷ “right to have rights”,²⁸ and the right to “belong to the civilized world”.²⁹

1.3 Statelessness

Article 1(1) of the Convention Relating to the Status of Stateless Persons³⁰ defines a stateless person as a person who is not considered as a national by any state under the operation of its law. There are two classes of stateless persons, namely, *de jure* and *de facto* stateless persons. A *de jure* stateless person is one who is not a citizen of any state, as defined in Article 1 of the Convention. On the other hand, a *de facto* stateless person is one who is outside his/her country but is unable or unwilling, for some valid reasons, to avail himself/herself of the protection of that country.³¹ Protection, in this sense, refers to the right of diplomatic protection exercised by a state in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally.³² Although some authors distinguish between *de jure* and *de facto* statelessness, this thesis is principally concerned with *de jure* statelessness.

Like nationality, a key element of the concept of statelessness is the idea of a person not being under the protection of any state for the purpose of inter-state relations. This inability to come under the protection of any state seems to be reason why the condition of statelessness has always been historically considered abnormal.³³ For example, Aristotle described a stateless

²⁷ See Hannah Arendt, *The Origins of Totalitarianism* (Cleveland: The World, 1958), 297 [Arendt].

²⁸ *Ibid*, at 296.

²⁹ *Ibid*, at 300.

³⁰ (1954) U.N.T.S. Vol. 360, 117 [1954 Convention].

³¹ David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford: Oxford University Press, 2008) 79 [Weissbrodt]; see also Brad K. Blitz & Maureen Lynch, *Statelessness and the Benefits of Citizenship: A Comparative Study* (Oxford Brookes University, 2009), 5 [Blitz & Lynch].

³² UN High Commissioner for Refugees (UNHCR), *Expert Meeting – The Concept of Stateless Persons under International Law* (“Prato Conclusions”), May 2010, Part II, para. A(2), available at: <http://www.refworld.org/docid/4ca1ae002.html> [accessed 8 October 2013].

³³ See for example, Seckler-Hudson, *supra*, note 15, at 14; Clark Hanijan, *The Sovrien: An Exploration of the Right to be Stateless* (Vineyard Haven, MA: Polyspire, 2008) at 1 – 2.

person as a “beast or a god” ‘either above humanity or below it’.³⁴ De Lapradelle and Niboyet described stateless persons as “international vagabonds”.³⁵ According to Seckler-Hudson, a stateless person is “an unfortunate individual [who] is placed in the unenviable position of being without any country at all”, “an ill-fated person” who “will discover to his consternation that the frontiers of all civilized states are closed upon him”, a “*tertium quid* [a third party of ambiguous status] whose home is presumably somewhere between all other countries”.³⁶ She compares a stateless person to “vessels sailing on the open sea, but not sailing under the flag of any state, and hence not enjoying any protection.”³⁷

However, the abnormality of statelessness was not always considered from the humanitarian point of view; it was also considered abnormal because statelessness was seen as derogating from the sovereign power of a state to expel aliens from its territory.³⁸ A typical scenario of this derogation of sovereign power to expel aliens occurred shortly before the Second World War (WWII), when several European countries had admitted a large number of German Jews in their territory as refugees, workers, students, scholars, etc. The situation changed with the Nazi promulgation of the Reich Citizenship Law³⁹ which stripped the German Jews of their German citizenship. This resulted in a situation where states could no longer expel the erstwhile German Jews in their territory because no other state had the corresponding duty of receiving them.⁴⁰ Arendt aptly captured the dilemma of the European countries thus:

The real trouble started as soon as the two recognized remedies [for dealing with refugees], repatriation and naturalization, were tried. Repatriation measures naturally failed when there was no country to which these people could be deported. They failed

³⁴ Seckler-Hudson, *supra*, note 15, at 244 (citing Jowett, Benjamin, *The Politics of Aristotle*, translated into English in two volumes, the Clarendon Press, Oxford, 1885).

³⁵ Albert Geouffre de Lapradelle & Jean Paulin Niboyet, eds, *Repertoire de Droit International*, Tome VIII (Paris: Recueil Sirey, 1930).

³⁶ Seckler-Hudson, *supra*, note 15, at 12.

³⁷ *Ibid*, at 15 – 16; see also George Schwarzenbergen & Edward Duncan Brown, *A Manual of International Law*, 6d ed (Milton: Professional Books, 1976) at 115: the authors describe stateless persons as “*res nullius*” (nobody’s property).

³⁸ See for example, Weis, *supra*, note 15, at 56, Arendt, *supra*, note 27, at 278 – 286.

³⁹ *Reich Citizenship Law 1935*.

⁴⁰ In addition to the German Jews, there were also millions of stateless Russians, Armenians, and Romas across Europe who were denationalized by their respective countries and this became a major problem prior to and during WWII. See Arendt, *supra*, note 27, at 283.

not because of consideration for the stateless person; and not for humanitarian sentiments on the part of the countries that were swamped with refugees; but because neither the country of origin nor any other agreed to accept stateless person... In other words, the state, insisting on its sovereign right of expulsion, was forced by the illegal nature of statelessness into admittedly illegal acts. It smuggled the expelled stateless into neighboring countries and the latter retaliated in kind.⁴¹

It seems that present day states do sometimes face the dilemma of being unable to expel stateless persons from their territories. For example, the Canadian immigration authorities had tried to deport one of the 2013 Toronto VIA Rail terror suspects in 2004 but could not do so because, as a stateless Palestinian, the suspect could not be sent to any other country. Thus, statelessness became a clog in exercise of Canada's sovereign right to expel an 'alien', who turned out to become a potential future 'terror suspect'.⁴²

1.3.1 Causes of Statelessness

The causes of statelessness may be generally classified into personal acts and non-personal acts. For 'personal' acts, a person may deliberately renounce his citizenship without acquiring or having any intention to acquire another. An example of such personal acts is that by Garry Davis, a former US Army WWII B-17 bomber pilot who renounced his American citizenship in 1948 to become a "citizen of the world".⁴³ He founded the International Registry of World Citizens

⁴¹ *Ibid*, 283 – 284: The 'illegal acts' start by the denationalizing government whose "initial illegal act" puts the expelling state in a position where it violates international law because its authorities "violates the law of the country to which the stateless person is expelled". (Citing at 284 n. 36, Lawrence Preuss, "La Denationalization Imposée pour des Motifs Politiques" in *Revue Internationale française du Droit des Gens*, 1937, Vol. IV, Nos. 1, 2, 5).

⁴² See generally, Stewart Bell, "Canada tried, failed to deport VIA Rail terror suspect nine years ago", National Post 25 April 2013, online: National Post <<http://news.nationalpost.com/2013/04/25/exclusive-canada-tried-failed-to-deport-via-rail-terror-suspect-nine-years-ago/>>; CBC News, "Canada tried to deport terror suspect Raed Jaser", 25 April 2013, online: CBC <<http://www.cbc.ca/news/canada/story/2013/04/25/via-train-terror-plot.html>>.

⁴³ Susan Green, "Passport to Fame?" (2001) online: Seven Days <<http://www.7dvt.com/2001/passport-fame>>.

which reportedly has registered over 750,000 individuals from 150 countries.⁴⁴ He also founded the World Service Authority (WSA)⁴⁵ which issues “world” passports to applicants.⁴⁶ The “world passport” is reportedly issued “based on the inalienable right of all humans to travel freely on their own planet.”⁴⁷ The WSA also issues “World Identity Card”, “World Birth Certificate” and “World Marriage Certificate” to applicants, usually “registered World Citizens”, upon the payment of the requisite application fee.⁴⁸ It has so far issued 2,500,000 “world passports”⁴⁹ and over 180 countries have reportedly accepted the world passport, at one time or another.⁵⁰

‘Non-personal’ acts, on the other hand, generally refer to the “arbitrary denial and deprivation of citizenship” which “takes place as a result of a specific state action”.⁵¹ The state action may include the introduction of discriminatory laws targeting specific communities or ethnic groups or which make it “virtually impossible” for the targeted groups “to access their rights to citizenship, including establishing a legal identity by means of formal registration of births, marriages, and voting”.⁵² The state action may also be an outright denationalizing legislation or a “process of exclusion”, which usually occurs “during periods of state creation or state transformation”.⁵³ At times, the state action causing statelessness may also be involuntary or one which arises as a result of a clash of the nationality laws of two countries. An example of such situation is a story of a young Pakistani woman who was abused by her family in the Pakistani-administered part of Kashmir. She attempted to commit suicide by throwing herself in a river,

⁴⁴ World Government of World Citizens, “What is the World Government of World Citizens?” online: WGWC <<http://www.worldservice.org/gov.html>>[*What is WGWC?*].

⁴⁵ *Ibid.*

⁴⁶ WGWC, “World Service Authority FAQ”, online: WGWC <<http://www.worldservice.org/wcwfaq.html?s=1>>.

⁴⁷ *Ibid.* Chapter five of this thesis will examine the extent to which Garry Davis’ “world passport” ideas may be used to remedy the suffering of stateless people.

⁴⁸ *Ibid.*

⁴⁹ What is WGWC?, *supra*, note 44.

⁵⁰ Daniel Engber, “What’s a World Passport?”, *Slate* 24 March 2006, online: *Slate* <http://www.slate.com/articles/news_and_politics/explainer/2006/03/whats_a_world_passport.html?nav=tap3>.

⁵¹ Blitz & Lynch, *supra*, note 31, at 7.

⁵² *Ibid.*, at 7 – 8.

⁵³ *Ibid.*, at 9.

but she survived as the river took her to Indian-controlled Kashmir, where she was arrested for illegal entry and taken to jail. She was raped by one of the jailers and she gave birth to the jailer's child. Although DNA tests proved the child was the jailer's, he refused to acknowledge paternity of the child. The Indian government attempted to deport the woman, but the Pakistani authorities refused to accept the child as a Pakistani national. The woman refused to abandon her child in order to return to Pakistan and is now living in limbo in Indian-controlled Kashmir.⁵⁴

Available literature suggests that most recent cases of statelessness usually arise from dissolution of states and state succession.⁵⁵ For example, as discussed in chapter one, the dissolution of the former Soviet Union gave rise to the present stateless 'Non-citizens' of Latvia. The dissolution of the former Yugoslavia and Czechoslovakia also gave rise to the present stateless 'Erased People' of Slovenia, and Romas respectively.⁵⁶ Even the recent succession of Eritrea and South Sudan from the Federal Democratic Republic of Ethiopia and Federal Republic Sudan respectively has given rise to new cases of statelessness in Africa.⁵⁷ However, the cases of statelessness that arise from such dissolution of states and state succession are usually as a result of state legislations that exclude targeted groups from citizenship through a "process of exclusion".

⁵⁴ David Weissbrodt & Connie de la Vega, *International Human Rights Law* (Philadelphia: University of Pennsylvania Press, 2007), 83.

⁵⁵ See for example, Blitz & Lynch, *supra*, note 31, at 7 – 10; Katherine Southwick, "Ethiopia-Eritrea: statelessness and state succession" (2009) Forced Migration Review (No. 32) 15 – 17 [Southwick]; Laura Bingham, Julia Harrington Reddy, & Sebastian Köhn, *De jure Statelessness in the Real World: Applying the Prato Summary Conclusions* (New York: Open Society Initiative, 2011), 9 – 22; Brad K. Blitz, *Statelessness, Protection and Equity* (Forced Migration Policy Briefing 3) (Refugees Studies Centre – University of Oxford, 2009), 9 – 16; Open Society Justice Initiative, "Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Right to be Free from Arbitrary Deprivation of Nationality, And Combating Statelessness", Submission of the Open Society Justice Initiative to the United Nations Office of the High Commissioner for Human Rights for Consideration by the UN Commission on Human Rights at its Sixty-Second Session November 2005, 9 – 11, online: Open Society Foundation <http://www.opensocietyfoundations.org/sites/default/files/citizenship_20051101.pdf>.

⁵⁶ See for example, Blitz & Lynch, *supra*, note 31, at 9.

⁵⁷ See Southwick, *supra*, note 55, at 15; Katherine Southwick & M. Lynch, "Nationality for All: A Progress Report and Global Survey on Statelessness" (Refugees International, 2009) 18 – 20; See also Bronwen Manby, "International Law and the Right to a Nationality in Sudan" (Open Society Foundation, 2011), 3 – 9.

2.0 EMERGENCE OF NATIONALITY AS A ‘HUMAN RIGHT’

Prior to WWII, some authors had canvassed a “right to nationality” in various forms. For example, Fiore, in the mid-nineteenth century, argued that the “right to nationality” is a primary, sacred and undeniable right.⁵⁸ He also argued that people have the right to nationality, not because they belong to the same race and speak the same language, but because God has created all men free and sociable.⁵⁹ Garner also described deprivation of nationality as a violation of “one of the most fundamental rights which belongs to the individual in modern society”,⁶⁰ while Scott also noted that there is *no greater right* than nationality.⁶¹ However, these pro-right to nationality views were in the minority, as the prevailing view prior to WWII seemed to be that the idea of a ‘right’ to nationality was a utopia.⁶²

The situation changed significantly as a result of the horrors of WWII, which necessitated the development of various reactionary safeguards against all identifiable Nazi strategies. One of such reactionary safeguards was the conception of a ‘right to nationality’. This arose from the realization that the Reich Citizenship Law 1935, which denationalized a large number of Jews and Romas, laid the foundation for the massive deportations of the holocaust victims to the various concentration camps.⁶³ Thus, the concept of a ‘right to nationality’ was originally designed to ensure, as the US representative at the UDHR Drafting Committee puts it, “individuals should not be subject to action such as was taken during the Nazi regime in Germany when thousands had been stripped of their nationality by arbitrary government action;

⁵⁸ Fiore, *supra*, note 11, at 119

⁵⁹ *Ibid.*

⁶⁰ James W. Garner, “Uniformity of Law in Respect to Nationality” (1925) 19 Am. Journal Int. Law 547, at 552.

⁶¹ See note 1 and the accompanying text above.

⁶² Fiore, *supra*, note 11, at 119.

⁶³ See generally, Ineta Ziemele & Gunnar G. Schram, “Article 15” in Gudmundur Alfredsson & Asbjorn Eide, eds., *The Universal Declaration of Human Rights; A Common Standard of Achievements*, (The Hague: Martinus Nijhoff, 1999), 297 at 300 – 301 [Ziemele & Schram]; Johannes Morsink, *The Universal Declaration of Human Rights; Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999) 80 – 83 [Morsink]; Mirna Adjami & Julia Harrington, “The Scope and Content of Article 15 of the Universal Declaration of Human Rights” (2008) 27:3 Refugee Survey Quarterly 93, at 96 [Adjami & Harrington].

and no one should be forced to keep a nationality when he did not want [it] and that he should not therefore be denied the right to change his nationality”.⁶⁴

2.1 The Making of ‘Right to Nationality’

The first draft article on the right to nationality was modeled after the Chilean government’s proposal. It originally states that:

- [a] Every person has the right to a nationality.
- [b] No state may refuse to grant its nationality to persons born upon its soil of parents who are legitimately present in the country.
- [c] No person may be deprived of his nationality of birth unless by his own free choice he acquires another nationality.
- [d] Every person has the right to renounce the nationality of his birth, or a previously acquired nationality, upon acquiring the nationality of another state.⁶⁵

However, this long draft was shortened to a simple single sentence: ‘everyone has a right to a nationality’ by Cassin (France’s representative).⁶⁶ Upon a successful Belgian proposal, Cassin’s short version of the draft article was amended to read thus:

- (1) Everyone has a right to a nationality.
- (2) All persons who do not enjoy the protection of any government shall be placed under the protection of the United Nations. This protection shall not be accorded to criminals nor to those whose acts are contrary to the principles and aims of the United Nations.⁶⁷

The reference to the United Nations was opposed by most members, mainly because it would put a “heavy burden” on the newly established United Nations and raise “false hope”.⁶⁸ The French Cassin supported the reference to the UN. He argued that the “purpose of article 15 was to express one of the general principles of mankind and to affirm that every human being should be

⁶⁴ As quoted by Ziemele & Schram, *supra*, note 63, at 301 (citing United Nations, Official Records, 1948, p. 352)

⁶⁵ See UNECOSOC, “Commission on Human Rights Drafting Committee, International Bill of Rights”, E/CN.4/AC.1/3/Add.1, 11 June 1947, 273 [E/CN.4/AC.1/3/Add.1].

⁶⁶ Morsink, *supra*, note 63, at 80; see also UNECOSOC, “Commission on Human Rights Drafting Committee, Second Session: Report of the Drafting Committee to the Commission on Human Rights”, E/CN.4/95, 21 May 1947, 8.

⁶⁷ See Morsink, *supra*, note 63, at 80 – 81.

⁶⁸ *Ibid.*

a member of a national group. The United Nations should contribute to putting an end to statelessness by urging the necessary measures upon sovereign states”.⁶⁹ He also pointed out that “since the war [WWII], France has made it a strict rule not to declare forfeiture of nationality”,⁷⁰ and that it was the duty of the Committee to “prepare the work for the General Assembly with a view of granting everyone a right to nationality”.⁷¹ However, the United States (US), United Kingdom (UK), Soviet Union (USSR) and some others vigorously opposed putting any burden on the UN to deal with statelessness. The US suggested that the whole article should be “deleted” altogether.⁷² The UK also suggested that the first sentence (“everyone has a right to nationality”) should instead be replaced by “[p]ersons shall not be deprived of their nationality, which they have acquired at birth, unless possessing another nationality”.⁷³ It also suggested the deletion of the second sentence in view of an earlier decision that obligations should be imposed upon the UN in a similar case concerning right to asylum.⁷⁴ The government of Netherlands also contended that the “first paragraph should be deleted” because “[i]t appears from the second paragraph that the object of this article is to ensure that *every* one will have the right to invoke some official protection; for this purpose paragraph 1 stipulating that everyone has the right to a nationality is not necessary.”⁷⁵ Consequently, the second paragraph was later rejected by a majority vote, leaving only the first sentence (“everyone has a right to a nationality”) as the surviving provision.⁷⁶

⁶⁹ See UNECOSOC, “Commission on Human Rights Drafting Committee, Second Session: Summary Record of the Thirty Ninth Meeting”, E/CN.4/AC.1/SR.39, 1 June 1948, 7 [E/CN.4/AC.1/SR.39].

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.* For the US proposal see, UNECOSOC, “Commission on Human Rights Drafting Committee, Second Session: Draft International Declaration on Human Rights (Document E/600) with United States’ Recommendation, E/CN.4/AC.1/20, 5 May 1948, 6.

⁷³ E/CN.4/AC.1/SR.39, *supra*, note 69, at 6.

⁷⁴ *Ibid.* See also Kesby, *supra*, note 17, at 48.

⁷⁵ UNECOSOC, Commission on Human Rights (Third Session) Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation- Communications Received from the Netherlands, E/CN.4/82/Rev.1, 22 April 1948, p.7.

⁷⁶ E/CN.4/AC.1/SR.39, *supra*, 8. See also Morsink, *supra*, note 63, at 81; UNECOSOC, Commission on Human Rights (Third Session) Observations of Governments on the Draft Declaration on Human Rights, the Draft International Covenant on Human Rights, and Methods of Application- Communication Received from the French Government, E/CN.4/8/Add.8, 6 May

Despite the removal of the reference to the UN, some powerful states were still opposed to any idea of a right to nationality. The United Kingdom and the India delegates, for example, consistently rejected the first paragraph and contended instead that the only right everyone could be entitled to is a “right not to be deprived of one’s nationality”.⁷⁷ Uruguay argued instead for the “right of changing nationality”.⁷⁸ The US called for the “omission” of the right. Demchenko, the Ukrainian delegate, summed up the argument against the right in his argument that “the principle of national sovereignty would be violated by the adoption of the idea that everyone had the right to a nationality”.⁷⁹ Consequently, the surviving first sentence (“everyone has a right to nationality”) was rejected at Third Session of the Drafting Committee on account of its clash with States’ sovereignty on determining nationality.⁸⁰ It was replaced by a UK-India text, as amended by the Uruguay delegation, which simply states that: “No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”⁸¹

However, like Banquo’s ghost who will not vanish away,⁸² the first sentence (“everyone has a right to nationality”) resurfaced at a later stage – during the debate on the meaning and propriety of the word ‘arbitrarily’ in the adopted UK-India text. The reintroduction of the first sentence was as a result of a successful proposal for the amendment of the UK-India text by France, Lebanon, Cuba and Uruguay.⁸³ It was re-adopted by 31 votes to 1, with 11 abstentions. The first part of the second paragraph (‘no one shall be arbitrarily deprived of his nationality’) was adopted unanimously, while the second part (‘nor denied the right to change his nationality’) was also adopted by 36 votes to 6 with 1 abstention.⁸⁴ Hence the version of the Article 15 of the

1948; UNECOSOC, “Commission on Human Rights (Third Session) Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation- Communication received from Brazil”, E/CN.4/82/Add.2, 22 April 1948, 5.

⁷⁷ See generally, Morsink, *supra*, note 63, at 81 – 83.

⁷⁸ See E/CN.4/AC.1/3/Add.1, *supra*, note 65, at 273.

⁷⁹ *Ibid.*

⁸⁰ See Morsink, *supra*, note 63, at 81 – 82.

⁸¹ *Ibid.*

⁸² Scott, *supra*, note 1, at xii.

⁸³ See Morsink, *supra*, note 63, at 82.

⁸⁴ *Ibid.*, at 83.

UDHR adopted by the UN General Assembly (UNGA) at the Palais de Chaillot, Paris on 10 December 1948 states that: “(1) Everyone has a right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality”.

2.2 Status of the UDHR

The UDHR contains a wide range of political and socio-economic rights, whose origin can be traced to the *rights* outlined in various historical Western documents, such as, the *Magna Carta* (1215),⁸⁵ the English Bill of Rights (1689),⁸⁶ the US Declaration of Independence (1776), Bill of Rights (US) (1789),⁸⁷ and the French Declaration of the Rights of Man and of Citizens (1789).⁸⁸ Examples of rights whose origin could be traced to the Western documents include: the right to life, liberty and security of person;⁸⁹ freedom from torture or from cruel, inhuman or degrading treatment or punishment;⁹⁰ right to equality before the law and freedom from discrimination;⁹¹ freedom from arbitrary arrest, detention or exile;⁹² right to fair hearing;⁹³ presumption of innocence, etc.⁹⁴ The inclusion of these rights in the UDHR was also as result of the horrors of the Holocaust and other Nazi atrocities.⁹⁵

⁸⁵ *Magna Carta* (Great Charter of English Liberties), 1215, text reproduced in David Robertson, *A Dictionary of Human Rights* (London-UK: Europa, 1997) 220 [Robertson].

⁸⁶ *English Bill of Rights*, 16 December 1689, text reproduced in Robertson, *supra*, note 85, at 229.

⁸⁷ *Bill of Rights* (US) 1789, text reproduced in Robertson, *supra*, note 85, at 231.

⁸⁸ *Declaration of the Rights of Man*, 1789, text reproduced in Robertson, *supra*, note 85, at 233.

⁸⁹ Article 3 of the UDHR is similar to the provisions of Article 5 of the US Bill of Rights (1789), Article 7 of French Declaration, and Article 39 of the *Magna Carta*.

⁹⁰ Article 5 of the UDHR is similar to Article 9 of the French Declaration.

⁹¹ Article 7 of the UDHR is similar to Article 1 of the French Declaration and the preamble to the US Declaration of Independence.

⁹² Article 9 of the UDHR is similar to Article 5 US Bill of Rights, Article 4, 7 and 8 of the French Declaration.

⁹³ Article 10 of the UDHR is similar to Articles 8 and 9 of French Declaration, Article 6 of US Bill of Rights, and Article 40 *Magna Carta*.

⁹⁴ Article 11(1) of the UDHR is similar to Article 9 of the French Declaration.

⁹⁵ On the impact of the Holocaust and other Nazi atrocities on the adoption of each provision of the UDHR, see Morsink, *supra*, at 37 – 91; Ashild Samnøy, “The Origins of the Universal Declaration of Human Rights” in Gudmundur Alfredsson and Asbjørn Eide, eds., *The Universal Declaration of Human Rights; A Common Standard of Achievements* (The Hague: Kluwer Law International, 1999), 3 – 22 [Samnøy]; Mashood A. Baderin & Manisuli Ssenyonjo,

Being a resolution of the UNGA, the UDHR is technically not a binding legal document.⁹⁶ The records of UDHR draft committee proceedings suggest that the states representatives intended the UDHR to be a provisional document containing only political-moral aspirations, rather than binding legal obligations.⁹⁷ The provisions of the UDHR was intended to be subsequently transformed into legally binding obligations *via* the International Covenants on Civil and Political Rights (ICCPR)⁹⁸ and the Covenant on Economic, Social and Cultural Rights (ICESCR),⁹⁹ which were also under consideration at the time the UDHR was adopted in 1948. The two Covenants have now developed most of the rights enshrined in the UDHR, making them effectively binding on the states that have ratified them. Together with the UDHR, the Covenants comprise what is today known as the International Bill of Human Rights.

The UDHR is regarded as the foundation of modern international human rights law and it exerts a moral, political, and legal influence on the jurisprudence of human rights far beyond the hopes

“Development of International Human Rights Law before and after the UDHR”, in Mashood A. Baderin and Manisuli Ssenyonjo, eds, *International Human Rights Law, Six Decades after the UDHR and Beyond* (Surrey, England: Ashgate, 2010), 3 – 27 [Baderin & Ssenyonjo]; Mark Freeman & Gibran Van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) 70 – 73 [Freeman & van Ert]; Henry J. Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, 3d ed (Oxford: Oxford University Press, 2008) 136 – 137.

⁹⁶ See Malcom N. Shaw, *International Law*, 6th ed, (Cambridge: Cambridge University Press, 2008), 114 (“resolutions of the Assembly are generally not legally binding and are merely recommendatory”); Obed Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (The Hague: Martinus Nijhoff, 1966) 19 – 25; Stephen M. Schwebel, “The Effect of Resolutions of the U.N. General Assembly on Customary International Law” (1979) 73 Proc. Am. Soc’y Int’l L 301-309; Gregory J. Kerwin “The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts” (1983) Duke Law Journal 876.

⁹⁷ See for example, Samnoy, *supra*, note 95, at 10; Morsink, *supra*, note 63, at 12 – 14; Marco Odello & Sofia Cavandoli, eds., *Emerging Areas of Human Rights in the 21st Century: The Role of the Universal Declaration of Human Rights* (New York: Routledge, 2011), 1 – 6; Emma McClean, “The dilemma of intervention: Human rights and the UN Security Council” in Marco Odello & Sofia Cavandoli, eds., *Emerging Areas of Human Rights in the 21st Century The Role of the Universal Declaration of Human Rights* (New York: Routledge, 2011), 24 at 25; Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens and Sons Limited, 1950) at 416.

⁹⁸ (1966) U.N.T.S. Vol. 999, 171 [ICCPR].

⁹⁹ (1966) U.N.T.S. Vol. 993, 3.

and expectations of many of its drafters.¹⁰⁰ Some authors have argued that it carries legal weight beyond a resolution or other declarations of the UNGA.¹⁰¹ Some authors have also argued that the UDHR as a whole embodies the ‘customary international law’ on human rights.¹⁰² However, the emerging consensus is that *some* of its provisions represent customary international law. These include, for example, prohibition against racial discrimination, abolition of slavery, and the right to self-determination.¹⁰³

2.3 Article 15 of the UDHR (Right to a Nationality)

Whilst, as noted above, most provisions of the UDHR have their roots in historical western documents, the right to nationality provided for under Article 15 of the UDHR does not enjoy any such history: there is no evidence to suggest such right was acceptable to states until it was introduced into the draft of the UDHR.¹⁰⁴ Hence, Article 15 has been hailed as “a total innovation in the history of international law”.¹⁰⁵ It is also said to represent a fundamental departure from the traditional view of nationality as being exclusively an act of sovereignty.¹⁰⁶ The provisions of Article 15 of the UDHR are now complemented by a number of international

¹⁰⁰ See generally, Hurst Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law” (1995) 25: Georgia Journal of International and Comparative Law 287, at 289 – 290 [*Hannum*]; Hurst Hannum, “The UDHR in National and International Law” (1998) 3:2 Health and Human Rights 144 – 146; Antoon De Baets, “The Impact of the Universal Declaration of Human Rights on the Study of History” (2009) 48 History and Theory 20, at 20 – 23.

¹⁰¹ See for example, Asbjorn Eide & Gudmundur Alfredsson, “Introduction” in Gudmundur Alfredsson & Asbjorn Eide, eds., *The Universal Declaration of Human Rights; A Common Standard of Achievements* (The Hague: Kluwer Law International, 1999), xxx [*Eide & Alfredsson*]; Asbjorn Eide & Gudmundur Alfredsson, “Introduction” in Asbjorn Eide, *et al*, eds., *The Universal Declaration of Human Rights; A Commentary* (Oslo: Scandinavian University Press, 1992), 7.

¹⁰² See Baderin & Ssenyonjo, *supra*, note 95, at 3 – 27; Manisuli Ssenyonjo, “Economic, Social and Cultural Rights”, in Mashood A. Baderin & Ssenyonjo, eds., *International Human Rights Law*, (Surrey-England, Ashgate, 2011); Philip Alston & Gerard Quinn, “The Nature and Scope of States Parties’ Obligations under the International Covenant on Economics, Social and Cultural Rights” (1987) 9 Human Rights Quarterly 14.

¹⁰³ See for example: Hannum, *supra*, note 100, at 314.

¹⁰⁴ See Adjami & Harrington, *supra*, note 18, at 95 – 96.

¹⁰⁵ Chan, *supra*, note 12, at 3 n 16 citing M. Robinson, *The Universal Declaration of Human Rights* (New York, Institute of Jewish Affairs, 1958) at 123.

¹⁰⁶ See Ziemele & Schram, *supra*, note 63, at 297.

legal instruments which border on right to nationality or reduction of statelessness. These include the following discussed below.

2.3.1 The International Covenant on Civil and Political Rights (ICCPR)

As noted above, the ICCPR has codified all the civil and political rights set out in the UDHR.¹⁰⁷ It is the most comprehensive binding international instrument on human rights and also one of the most widely accepted international instruments on human rights: 167 States (including Kuwait and Latvia, but excluding Burma) are presently parties to the Convention.¹⁰⁸ However, in relation to the right to nationality, the ICCPR shares similar history with the UDHR. This is because Article 32 of an earlier draft of the ICCPR provides *inter alia* that “everyone is entitled to the nationality of the State where he is born unless and until on attaining majority he declares for the nationality open to him by virtue of descent.”¹⁰⁹ This draft was similar to the Chilean proposal regarding Article 15 of the UDHR which had provided that “no state may refuse to grant its nationality to persons born upon its soil of parents who are legitimately present in the country”.¹¹⁰ However, just like the UDHR, it seems that only the French representative (Cassin) supported the inclusion of a right to nationality in the draft covenant, though he also observed that the right was not specified in any of the existing national bills of rights (Constitutions).¹¹¹ Other states were apparently not in support of the inclusion of the right in the ICCPR, hence the article was omitted in the final draft.¹¹²

Nonetheless, there is a limited reference to a right to nationality in Article 24(3) of the Covenant which provides that “every child has a right to acquire a nationality”.

¹⁰⁷ ICCPR, *supra*, note 98.

¹⁰⁸ Status update as at 20 August 2013, online: United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

¹⁰⁹ E/CN.4/AC.1/3/Add.1, *supra*, note 65, at 273.

¹¹⁰ See note 65 and the accompanying text above.

¹¹¹ *Ibid.*

¹¹² Kesby noted that it was omitted due to its “complexity”. See Kesby, *supra*, note 17, at 48.

2.3.2 International Convention on the Elimination of All Forms of Racial Discrimination¹¹³

The Convention is also a widely accepted international human rights instrument: 175 States (including Kuwait and Latvia, but excluding Burma) are parties to the Convention.¹¹⁴ By Article 5(d)(iii) of the Convention, contracting States undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, in the enjoyment of the right to nationality.

2.3.3 Convention on the Nationality of Married Women¹¹⁵

The purpose of the Convention is to address the “conflict in law and in practice” arising “as a result of provisions concerning the loss or acquisition of nationality by women as a result of the marriage, of its dissolution or change of nationality by the husband during marriage”.¹¹⁶ Its purpose is also to give effect to Article 15 of the UDHR.¹¹⁷ So far, only 74 States (including Latvia, but excluding Burma and Kuwait) are parties to the Convention.¹¹⁸ Under Article 1 of the Convention, each State party agrees that that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife. The States also agree that neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national.¹¹⁹

¹¹³ (1966) U.N.T.S. Vol. 660, 195.

¹¹⁴ Status update as at 20 August 2013, online: United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en>.

¹¹⁵ (1957) U.N.T.S. Vol. 309, 65.

¹¹⁶ *Ibid*, first preambular paragraph.

¹¹⁷ *Ibid*, second preambular paragraph.

¹¹⁸ Status update as at 20 August 2013, online: United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XVI~2&chapter=16&Temp=mtdsg3&lang=en>.

¹¹⁹ *Ibid*, Article 2.

2.3.4 Convention on the Elimination of All Forms of Discrimination against Women¹²⁰

The objective of the Convention is to eliminate all various forms of discrimination against women. It is also one of the most widely accepted binding international human rights instruments: 187 States (including Burma, Kuwait and Latvia) are parties to the Convention.¹²¹ Contracting States undertook to grant women equal rights with men to acquire, change or retain their nationality.¹²² The contracting States also undertake to grant women equal rights with men with respect to the nationality of their children.¹²³

2.3.5 The Convention on the Rights of the Child (CRC)¹²⁴

Article 7 of the Convention provides that “the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality”. Parties are obliged to ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments, in particular where the child would otherwise be stateless.¹²⁵ The CRC is also a widely accepted binding international human rights instrument: 193 States (including Burma, Kuwait and Latvia) are parties to the Convention.¹²⁶

2.3.6 Convention Relating to the Status of Stateless Persons¹²⁷

This Convention is intended to further rights outlined in the UDHR, especially “the principle that human beings shall enjoy fundamental rights and freedom without discrimination.”¹²⁸ Its purpose

¹²⁰ (1979) U.N.T.S. Vol. 1249, 13.

¹²¹ Status update as at 20 August 2013, online: United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en>.

¹²² *Ibid*, Article 9.

¹²³ *Ibid*.

¹²⁴ (1989) U.N.T.S. Vol. 1577, 3.

¹²⁵ *Ibid*, Article 7(2).

¹²⁶ Status update as at 20 August 2013, online: United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en>.

¹²⁷ (1954) U.N.T.S. Vol. 360, 117 [1954 Convention].

is to ensure that stateless persons enjoy the “widest possible exercise” of the fundamental rights and freedoms set out in the UDHR.¹²⁹ Its main thrust is that it obliges contracting States to accord stateless persons “lawfully in their territory treatment as favourable as possible, and in any event, not less favourable than that accorded to aliens generally in the same circumstances”.¹³⁰ Thus, under the Convention, stateless persons are entitled to enjoy the same rights and privilege which the relevant State accords to aliens in areas of acquisition of moveable and immovable properties,¹³¹ gainful employment,¹³² right of association,¹³³ housing,¹³⁴ education,¹³⁵ and freedom of movement.¹³⁶ In respect of freedom of religion,¹³⁷ right of access to court,¹³⁸ and intellectual property protection,¹³⁹ stateless persons are entitled to enjoy the same rights and privilege as the nationals of contracting States.

However, very few States have ratified the Convention: only 78 countries (including Latvia, but excluding the US, Canada, Russia, India, and also Burma and Kuwait) are parties to the Convention.¹⁴⁰

2.3.7 Convention on the Reduction of Statelessness¹⁴¹

The UN adopted this Convention in 1961 as a follow up to the 1954 Convention on the Status of Stateless Persons. Of particular importance is Article 1 of the Convention which provides that contracting States shall grant nationality to any person born in its territory who would otherwise

¹²⁸ *Ibid*, first preambular paragraph.

¹²⁹ *Ibid*, second preambular paragraph.

¹³⁰ See for example, Articles 7, 13, 15, 17, 18 of the Convention.

¹³¹ *Ibid*, Article 13.

¹³² *Ibid*, Articles 17-19.

¹³³ *Ibid*, Article 15.

¹³⁴ *Ibid*, Article 21.

¹³⁵ *Ibid*, Article 22.

¹³⁶ *Ibid*, Article 26.

¹³⁷ *Ibid*, Article 4.

¹³⁸ *Ibid*, Article 16.

¹³⁹ *Ibid*, Article 14.

¹⁴⁰ Status update as at 20 August 2013, online: United Nations Treaty Collection
<http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en>.

¹⁴¹ (1961) U.N.T.S. Vol. 989, 175.

be stateless, and any foundling found in the state shall be presumed to have been born in that state.¹⁴² A Contracting State is also obliged to grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State.¹⁴³ Under Article 6 of the Convention, if the law of a Contracting State provides for loss of its nationality by a person's spouse or children as a consequence of that person losing or being deprived of that nationality, such loss shall be conditional upon their possession or acquisition of another nationality. Article 7 also provides that the State law which permits renunciation of nationality should ensure that such renunciation shall not result in loss of nationality unless the person concerned possesses or acquires another nationality. By Article 9, States may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.

However, even though the Convention mainly seeks to reduce the increasing cases of statelessness, only 53 countries (including Latvia, but excluding major powers like the US, China, India, Russia, etc., and also Burma and Kuwait) are parties to the Convention to date.¹⁴⁴

2.3.8 Regional Instruments

In addition to the above international instruments, there are also some regional human rights instruments that contain provisions relating to a right to nationality. The relevant regional instruments are discussed below.

2.3.8.1 Americas

The American Declaration of the Rights and Duties of Man¹⁴⁵ provides that “every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the

¹⁴² *Ibid*, Article 2.

¹⁴³ *Ibid*, Article 4.

¹⁴⁴ Status update as at 20 August 2013, online: United Nations Treaty Collection <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en>.

nationality of any other country that is willing to grant it to him.”¹⁴⁶ Like the UDHR, the Declaration is not a technically binding instrument, but its provisions have been codified in the American Convention on Human Rights.¹⁴⁷ Unlike the ICCPR which left out Article 15 of the UDHR, Article 20 of the American Convention provides as follows:

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

2.3.8.2 Europe

Although the European Convention for the Protection of Human Rights¹⁴⁸ resolved to “take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration”,¹⁴⁹ it contains no provision for a right to nationality. The European Charter of Fundamental Rights¹⁵⁰ also does not contain any provision for the right to nationality.

However, the European Convention on Nationality¹⁵¹ contains provisions relating to the right to nationality in Europe. The Convention bears “in mind the numerous international instruments relating to nationality, multiple nationality and statelessness”.¹⁵² It also recognizes that, “in

¹⁴⁵ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

¹⁴⁶ *Ibid*, Article XIX.

¹⁴⁷ Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: <http://www.refworld.org/docid/3ae6b36510.html> [accessed 25 April 2013].

¹⁴⁸ *European Convention for the Protection of Human Rights and Fundamental Freedoms*- as amended by Protocols No. 11 and 14, Rome, 4.XI.1950, European Treaty Series - No. 5, online: Council of Europe <<http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=25/04/2013&CL=ENG>>.

¹⁴⁹ *Ibid*, sixth preambular paragraph.

¹⁵⁰ European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (OJ C 364/01).

¹⁵¹ Council of Europe, *European Convention on Nationality*, 6 November 1997, ETS 166.

¹⁵² *Ibid*, third preambular paragraph,

matters concerning nationality, account should be taken of both the legitimate interests of States and those of individuals”¹⁵³ and desires “to promote the progressive development of legal principles concerning nationality, as well as their adoption in internal law and desiring to avoid, as far as possible, cases of statelessness”.¹⁵⁴ Article 2 of the Convention defines ‘nationality’ as “the legal bond between a person and a State and does not indicate the person’s ethnic origin”. Article 3 affirms exclusive sovereignty of States to determine their nationals. It states that “[e]ach State shall determine under its own law who are its nationals” and the law “shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality”. Article 4 ostensibly seeks to give effect to Article 15 of the UDHR, as well as other international instruments. It provides that the rules on nationality of each State Party shall be based on the following principles:

- (a) everyone has the right to a nationality;
- (b) statelessness shall be avoided;
- (c) no one shall be arbitrarily deprived of his or her nationality;
- (d) neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.

Article 5 provides that the rules of States on nationality shall not contain distinctions or include any practice which amounts to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin. Article 6 obliges each State to provide in its internal law for its nationality to be acquired *ex lege* by (i) children one of whose parents possesses the nationality of that State Party, at the time of the birth of the children, (ii) foundlings found in its territory who would otherwise be stateless, (iii) children born on its territory who do not acquire at birth another nationality. The Article provides that each State Party shall permit the renunciation of its nationality provided the persons concerned do not thereby become stateless.

¹⁵³ *Ibid*, fourth preambular paragraph.

¹⁵⁴ *Ibid*, fifth preambular paragraph.

2.3.8.3 Middle East

Article 24 of the 1994 Arab Charter on Human Rights¹⁵⁵ provides that “no citizen shall be arbitrarily denied of his original nationality, nor denied his right to acquire another nationality without legal basis”. This Charter was replaced by a more elaborate 2004 Arab Charter on Human Rights,¹⁵⁶ Article 29 of which provides that “every person has the right to a nationality, and no citizen shall be deprived of his nationality without a legally valid reason”. It also enjoins State parties to take appropriate legislative measures to allow a child to acquire the nationality of his mother with regard to the interest of the child.¹⁵⁷

2.3.8.4 Africa

The African Charter on Human and Peoples’ Rights does not contain any direct provision on the right to nationality. However, in April 2013, the African Commission on Human and Peoples’ Rights (ACHPR) passed a Resolution on the right to nationality.¹⁵⁸ The resolution *inter alia* “[r]eaffirms that the right to nationality of every human person is a fundamental human right implied within the provisions of Article 5 of the African Charter on Human and Peoples’ Rights and essential to the enjoyment of other fundamental rights and freedoms under the Charter”.¹⁵⁹ It “[c]alls upon African States to refrain from taking discriminatory nationality measures and to repeal laws which deny or deprive persons of their nationality on grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status, especially if such measures and laws render a person stateless.”¹⁶⁰ It also enjoins African States “to observe minimum procedural standards so that decisions concerning the recognition, acquisition, deprivation or change of nationality do not contain any elements of

¹⁵⁵ League of Arab States, *Arab Charter on Human Rights*, 15 September 1994, available at: <http://www.refworld.org/docid/3ae6b38540.html> [accessed 11 October 2013].

¹⁵⁶ League of Arab States, *Arab Charter on Human Rights*, May 22, 2004, reprinted in (2005) 12 Int'l Hum. Rts. Rep. 893; see also, Mohammed Amin Al-Midani & Mathilde Cabanettes, “Arab Charter on Human Rights 2004” (2006) 24 Boston University International Law Journal 147.

¹⁵⁷ *Ibid*, Article 29(2).

¹⁵⁸ ACHPR, *Resolution on the Right to Nationality*, No. 234, 23 April 2013, online: ACHPR <<http://www.achpr.org/sessions/53rd/resolutions/234/>>.

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid*.

arbitrariness, and are subject to review by an impartial tribunal in accordance with their obligations under Article 7 of the African Charter.”¹⁶¹

Unlike most other regions, countries in Asia presently do not have regional human rights instruments.¹⁶²

3.0 INTERNATIONAL/REGIONAL INSTRUMENTS APPLICABLE TO BURMA, KUWAIT AND LATVIA

As explained in chapter one of thesis, one of reasons for the use of the Burmese Rohingyas, Kuwaiti Bidoons and ‘Non-Citizens’ of Latvia as case study for the purpose of interrogating continued statelessness vis-à-vis the right to nationality is that their factual situation encompasses the situations of other stateless groups. This includes the issue of whether their respective countries have adopted or ratified any of the above-mentioned international human rights instruments relating to the right to nationality.¹⁶³ The purpose of this section is to examine the status of the countries in relation to the aforementioned international instruments.

As noted above, there is currently no regional human rights instrument in Asia, thus Burma is not party to any regional human rights instrument. Burma is also not a party to most of the above-mentioned relevant international instruments relating to right to nationality and reduction of statelessness, except the CRC and the CERDW. Unlike Burma, Kuwait is a party to most of the relevant international instruments, except the CRS and the CSSP. It however made reservations to the operative provisions of most of the relevant international instruments relating to the right to nationality. Kuwait has also ratified the Arab Charter on Human Rights. By contrast, Latvia

¹⁶¹ *Ibid.*

¹⁶² See Jina Kim, “Development of Regional Human Rights Regime: Prospects for and Implications to Asia” in Yozo Yokota, ed, *Contentious Politics and Human Rights* (Tokyo: Tokyo Foundation, 2009), 57.

¹⁶³ See page 5 above.

has ratified all the relevant international instruments on the right to nationality without making any reservation. It has also signed the European Convention on Nationality.¹⁶⁴

4.0 CONCLUSION

The concept of nationality in international law has progressed from being a ‘privilege’ relevant only for the purpose of inter-state relations to a ‘human right’ everyone is entitled to under international law as provided for by the UDHR and other instruments. But unlike other internationally recognized human rights whose origin are traceable to progressive historical Western documents on human rights, the right to nationality was borne out of the necessities of WWII. The right to nationality has three elements namely (a) everyone has right to a nationality, (b) the prohibition of arbitrary deprivation of an individual’s nationality, and (c) preservation of an individual’s right to change a nationality.

As noted above, *some* provisions of the UDHR are regarded as customary international law. The question that then arises is whether, in view of the plurality of international/regional instruments bordering on right to nationality and reduction of statelessness, the right to nationality as provided for by Article 15 of the UDHR is part of customary international law. A corollary of this question is the issue of whether the right to nationality is a ‘fundamental’ or ‘relatively important right’ the invasion of which, as Dworkin has argued, “must be a very serious matter”.¹⁶⁵ In determining the question, it is necessary to examine the interplay between the right to nationality and states’ sovereignty on nationality matters, and the resultant effect of the interplay on the continued existence of stateless people like the Rohingyas and the Bidoons.

¹⁶⁴ The effect of Burma not being a party and of Kuwait making reservation to most relevant instruments will be considered in chapters 3 and 4 below.

¹⁶⁵ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) 199.

CHAPTER THREE

RIGHT TO NATIONALITY VERSUS STATE SOVEREIGNTY

*The law of nationality is primarily a domestic matter as regards each state, to be determined by each state for itself, according to its needs, social, political, military, economic, etc. Thus no state is willing to surrender its sovereign prerogative in the matter of determining the way in which its nationality may be acquired.*¹

States play a very important role in the traditional concept of nationality; the development of international law on nationality has largely been state oriented and dominated by state interest.² In the face of a state-dominated conception of nationality, Article 15 of the UDHR provides that everyone has a right to nationality. The purpose of this chapter is to examine nationality as an exercise of state sovereignty and the impact of state sovereignty on the status of nationality as a ‘human right’ and whether it forms part of customary international law. This examination is for the purpose of interrogating the continued existence of stateless people like the Rohingyas and the Bidoons in the face of international law’s recognition of a right to nationality.

1.0 STATE SOVEREIGNTY ON NATIONALITY MATTERS

As discussed in chapter two, the modern concept of nationality is generally traced to the Peace of Westphalia Treaty (1648) which gave birth to the modern state. The Treaty also established the fundamental principles of international law which rests on the twin ideas of sovereign independence and equality of States.³ One major component of ‘sovereign independence’ is the principle of non-interference in the ‘internal affairs’ of a state, that is, the rule that the relationship between a state and its nationals is subject to the exclusive jurisdiction of that state. A corollary of this rule is the exclusive rights of each state to regulate and determine its

¹ Flournoy Richard W. Jr., “Nationality Convention Protocols and Recommendations Adopted by the First Conference on the Codification of International Law” (1930) 24 Am. Jour. Int’l Law 467 [Flournoy].

² Johannes M.M. Chan, “The Right to a Nationality as a Human Right; the Trend towards recognition” (1991) 12 Human Rights Law Journal 1 [Chan].

³ *Ibid.* See also Gerbard von Glahn & James Larry Taulbee, *Law Among Nations: An Introduction to Public International Law*, 8th ed (New York: Pearson Education, 2007) 46 [von Glahn & Taulbee].

membership or who its nationals are. This right is traditionally jealously guarded by all states, and as Flournoy aptly observed, “no state is willing to surrender its sovereign prerogative in the matter of determining the way in which its nationality may be acquired.”⁴

Although states have historically recognized the sovereign exclusive rights of other states to regulate their membership, available evidence of states practice show that states also generally recognized that the right of states to determine nationality is not unlimited.⁵ The recognized limitation was, however, not based on any acceptance of an individual “right” to nationality; rather, it relates to the extra-territorial claim of nationality which usually gives rise to competing sovereignty claims, especially pre-Second World War (WWII). A typical scenario of this kind will arise, for example, if Germany claims sovereignty over persons of German descent, who reside in France and over whom France also claimed sovereignty. The implication of such competing sovereignty claims is that the two countries will hold conflicting views in relation to such persons. For example, while France will hold the view that whatever it does to such persons [its perceived citizens] are within its “internal affairs”, Germany will a a contrary view that they are Germans and Germany has a right to protect them or insist they are treated in accordance with international law. Such competing claims also had a wider implication as to which of the competing states will have the right to draft such persons for military service when necessary, in war-prone Europe prior to WWII.⁶ In order to avoid such conflicting claims, Garner argued that “[m]odern law ought to ensure that every man, woman, and child shall possess the nationality of

⁴ Flournoy, *supra*, note 1, at 467. See also Chan, *supra*, note 2, at 1.

⁵ See for example, Paul Weis, *Nationality and Statelessness in International Law* (Westport: Hyperion Press, 1979), 53ff [Weis]; Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* (New York: American University Graduate School, 1934) 2 – 3 [Seckler-Hudson].

⁶ For example, the Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (ETS 43, 1963, available online: Council of Europe <<http://conventions.coe.int/Treaty/en/Treaties/Html/043.htm>>) was intended to address the possible disputes relating to military obligations in cases of individuals possessing multiple nationality.

some state (*and but one*),”⁷ while Scott advised that “[t]here should be for every person a nationality – *a single and exclusive nationality*”.⁸

The need to preserve the jealously-guarded state sovereignty on nationality, as well as to harmonize conflicting nationality laws, which could potentially give rise to competing jurisdictional claims by states over the same subject/persons as described above, led to adoption of the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws.⁹ The Hague Convention is the first international instrument to address the issue of nationality. One of declared aims of the Convention was the abolition of “double nationality”.¹⁰ Article 1 of the Convention affirmed the pre-existing state sovereignty on nationality matters by providing that “[i]t is for each state to determine under its own law who are its nationals.” Article 2 of the Convention further states that “[a]ny question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the law of that State”. This state-centered position on nationality received judicial backing in the decision of the Permanent Court of International Justice (PCIJ) in the *Tunis and Morroco Nationality Decrees Case*¹¹ where the Court held that:

The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain.¹²

This position was also affirmed by the International Court of Justice (ICJ) in the *Nottebohm Case (Liechtenstein v. Guatemala)*,¹³ as well as some domestic courts (especially pre-UDHR)

⁷ James W. Garner, “Uniformity of Law in Respect to Nationality” (1925) 19 Am. Journal Int. Law 547, at 552 (emphasis supplied).

⁸ James Brown Scott in “Introduction” to Seckler-Hudson, *supra*, note 5, at ix [Scott]. (Emphasis added).

⁹ (1937-38) 179 L.N.T.S.89 (No. 4137).

¹⁰ *Ibid*, third preambular paragraph.

¹¹ (1923) P.C.I.J. Ser B., No. 4, p 24.

¹² *Ibid*.

¹³ *Nottebohm Case (Liechtenstein v. Guatemala)* 1955 I.C.J. 4 at 20: “It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation.”

decisions, which regarded nationality as falling exclusively within the legislative competence of a state.¹⁴

Although adopted prior to the present United Nations system, the Hague Convention still represents a valid authoritative statement of international law on nationality. Thus, the present state of international law still recognizes the sovereign rights of States to determine their membership. States generally express this sovereignty by making: (a) rules governing the conferment of nationality, and (b) rules relating to revocation, renunciation and loss of nationality.

1.1 Rules Governing Conferment of Nationality

International law generally recognizes the sovereign rights of each State to make its own rules governing the conferment of its citizenship by its municipal law. Hence, all States have varying rules governing the conferment of their nationality. These rules are generally classified into (a) *jus soli*, and (b) *jus sanguinis*.¹⁵

¹⁴ See for example, See *Re: Hoffman*, 13 F. Supp. 907 (1936) (US), where Cosgrave J. observed that “[i]t is generally held that the right of citizen is not an inherent right, but a privilege extended by the sovereign power. It is founded upon reciprocal relations, protection to the subject and allegiance to the sovereign”; *Stoeck v. Public Trustees* [1921] 2 Ch. 67 at 82 (UK), *per* Lord Russell: “Whether a person is a national of a country must be determined by the municipal law of that country. Upon this I think all tests writers are agreed. It would be strange were it otherwise. How could the municipal law of England determine that a person is a national of Germany?”; *Re Chamberlain’s Settlement* [1921], 2 Ch. 533 (UK). See also Weis, *supra*, note 5, at 33.

¹⁵ For a general discussion on *jus soli* and *jus sanguinis*, see David Weissbrodt & Connie de la Vega, *International Human Rights Law* (Philadelphia: University of Pennsylvania Press, 2007) 82 – 86; Brad K. Blitz & Maureen Lynch, *Statelessness and the Benefits of Citizenship: A Comparative Study*, (Oxford: Oxford Brookes University, 2009), 7 – 10 [Blitz & Lynch]; Brad K. Blitz, *Statelessness, Protection and Equity* (Forced Migration Policy Briefing 3) (Refugees Studies Centre- University of Oxford, 2009), online: Refugees Studies Centre <<http://www.rsc.ox.ac.uk/publications/policy-briefings/RSCPB3-Statelessness.pdf>>; Laura Bingham, Julia Harrington Reddy, & Sebastian Köhn, *De jure Statelessness in the Real World: Applying the Prato Summary Conclusions* (New York: Open Society Initiative, 2011); Katherine Southwick & M. Lynch, “Nationality for All: A progress Report and Global Survey on Statelessness” (Refugees International, 2009) 1 – 3.

Jus soli (right of soil/land) confers nationality on any individual born within the territory of a state. *Jus soli* is observed by few countries in the world, mainly in the Americas. For example, persons born in the United States or Canada are citizens of the US or Canada respectively, irrespective of the citizenship of their parents – except persons born to foreign diplomats or envoys.¹⁶ *Jus sanguinis* (law of blood), on the other hand, confers nationality based on family relationship, irrespective of place of birth. *Jus sanguinis* is observed by most countries in the world: all the countries in Europe,¹⁷ Africa (except Lesotho),¹⁸ Middle East,¹⁹ Asia (except Pakistan and Cambodia),²⁰ and recently, Australia and New Zealand.²¹ However, in some countries of the Arab world, *jus sanguinis* is only applicable to persons born to male members of the relevant country.²²

Some countries, in exercise of the exclusive sovereignty to determine their membership, confer their nationality on persons in a hybrid of *jus soli* and *jus sanguinis* situation. For example, apart from the fact that any person born in Canada and US is a citizen a Canada and US respectively,

¹⁶ *14th Amendment to the US Constitution*, 8 U.S.C. § 1401: “The following shall be nationals and citizens of the United States at birth: (a) a person born in the United States, and subject to the jurisdiction thereof” [US]; *Citizenship Act (R.S.C., 1985, c. C-29)*, section 3(1) (a): “a person is a citizen if... the person was born in Canada after February 14, 1977” [Canada]. See also *Antigua and Barbuda Citizenship Act 1982* (Cap 22 Laws of Antigua and Barbuda), sections 2 and 3; *Constitution of Jamaica, 1962*, section 3(3)(B); *Constitution of Trinidad and Tobago, 2000*, section 17; *Constitution of Dominican Republic, 2002*, Article 11(1).

¹⁷ See for example, *British Nationality Act, 1981*, Cap 61, section 1 [UK]; *German Nationality Act 1913* (Reich Law Gazette I p. 583 – Federal Law Gazette III 102-1), section 4 [Germany].

¹⁸ See for example, the *Constitution of the Federal Republic of Nigeria 1999*, section 25 [Nigeria]; *Constitution of the Republic of Ghana 1992*, section 6(2) [Ghana]; *Constitution of Zambia 1991*, Article 5 [Zambia]; *South African Citizenship Act, No. 88 of 1995*, section 2 [South Africa]. See also Bronwen Manby, “International Law and the Right to a Nationality in Sudan” (Open Society Foundation, 2011), online: Citizenship Rights <<http://www.citizenshiprightsinafrica.org/Publications/2011/Manby-Feb2011-Citizenship%20Options%20Sudan.pdf>>.

¹⁹ See for example, the *Civil Code of Iran, 1928*, Article 976 [Islamic Republic of Iran]; *Decree No 15 on Lebanese Nationality, 1925*, Article 1 [Lebanon].

²⁰ See for example the *Constitution of India, 1950*, Articles 5 and 6 [India]; *Burma Citizenship Law, 1982*, section 7 [Burma]; *Nationality Law of the People's Republic of China, 1980*, Article 4 [China]; *contra, Pakistan Citizenship Act, 1951*, Article 4 [Pakistan].

²¹ See Section 12 of the *Australian Citizenship Act, 2007*; section 1 of the *Citizenship Act, 1977* (New Zealand) as amended by the *Citizenship (Amendment) Act, 2005*.

²² See for example, Article 4 of Pakistan, *supra*, note 20.

persons born of Canadian or US parentage born outside Canada or US are also Canada or US citizens by birth.²³ The interplay between *jus soli* (as in the case with US and Canada) and *jus sanguinis* (especially in cases where the sex of the parents is irrelevant) is the major factor that has given rise to cases of multiple nationalities.²⁴ For example, where a child born is in Canada to a Nigerian mother and a UK father, the child is a Canadian, UK and Nigerian citizen by birth. However, in exercise of their sovereignty, the citizenship laws of countries like China,²⁵ Burma,²⁶ Kuwait,²⁷ Pakistan,²⁸ Lesotho, and Zambia,²⁹ do not permit such dual or multiple citizenships.

One other area of states sovereignty to make rules governing the conferment of its citizenship relates to the power of states to make rules for nationality by naturalization and registration. Through naturalization and registration, states confer nationality on residents who are otherwise not qualified to acquire nationality by birth. To this end, all states have their own unique naturalization and registration procedure, and there are hardly any two states that have identical provisions.

1.2 Rules Governing Revocation, Renunciation and Loss of Nationality

Another aspect of states' sovereignty to determine and regulate nationality is the sovereign power of a state to revoke the nationality conferred on its nationals in certain given situations.

²³ Section 3(b) of Canada, *supra*, note 16; paras. (c) and (d) of US, *supra*, note 16.

²⁴ See Philip Jessup, *A Modern Law of Nations: An Introduction* (NP: Archon Books, 1968) (“Dual nationality at birth is the natural and inevitable consequence of the coexistence of the two systems of *ius soli* and *ius sanguinis*.” at 73).

²⁵ Article 3 of China, *supra*, note 20.

²⁶ Section 13 of Burma, *supra*, note 20.

²⁷ Nationality Law 1959, KWT 110, Article 11 [*Kuwait*].

²⁸ Article 14 of Pakistan, *supra*, note 20.

²⁹ See Article 9 of Zambia, *supra*, note 18. However, the “first draft” Constitution 2012 recently submitted for ‘consultation’ by the Zambian Parliament seeks to reverse this position. Article 18 of the draft provides that: A citizen, by birth, shall not lose that citizenship by acquiring the citizenship of another country. (2) A person who, before the commencement of this Constitution, acquired the citizenship of another country and as a result ceased to be a Zambian citizen as specified in clause (1), is entitled, on application, to regain the citizenship. The draft Constitution is available online at <http://www.zambian.com/zambia-constitution-2012-first-draft.pdf>.

States have historically exercised this power, especially prior to and during the WWII, with some level of arbitrariness and without any restraint or international interference.³⁰ For example, France during the First World War stripped foreign-born naturalized nationals of their citizenship without any international interference or condemnation.³¹ Portugal issued a decree in 1916 that automatically denationalized all citizens born of a German father.³² Belgium in 1922 denationalized naturalized citizens who allegedly committed “antinational acts” during the First World War.³³ The Soviet Union also denationalized about two million people who had opposed the Bolshevik regime by virtue of the Union Citizenship Law of 13 November 1925.³⁴ Egypt and Turkey, in 1926 and 1928 respectively, passed laws that denationalized persons “who were a threat to the social order.”³⁵ Fascist Italy passed a law that denationalized people who were deemed by the fascist regime of being not “worthy of Italian citizenship” in 1926.³⁶ Nazi Germany, by the Reich Citizenship Law 1935, denationalized millions of Jews and Romas on racial grounds.³⁷ At about the same time, the United States was also reportedly “seriously considering” depriving Native Americans who were suspected communists of their citizenship.³⁸

Although there was no international interference in respect of the various revocations of nationality or denationalizing legislations, some scholars condemned such revocation, especially when it further exacerbated the increasing stateless populations of the pre-WWII Europe.³⁹ Garner, for example, argued that “any state which deliberately enacts legislation the effect of which is to denationalize any class of its own or of foreign nationals, except as a punishment for

³⁰ Usually the targeted groups are persons or ethnic groups considered disloyal to the relevant States.

³¹ See Hannah Arendt, *The Origins of Totalitarianism* (Cleveland: The World, 1958), 278 n 23 [Arendt].

³² *Ibid.*

³³ *Ibid.*

³⁴ See Blitz & Lynch, *supra*, note 15, at 8.

³⁵ Arendt, *supra*, note 31, at 278.

³⁶ *Ibid.*

³⁷ *Ibid.* See also Blitz & Lynch, *supra*, note 15, at 8; Ineta Ziemele & Gunnar G. Schram, “Article 15” in Gudmundur Alfredsson & Asbjorn Eide, eds., *The Universal Declaration of Human Rights; A Common Standard of Achievement* (The Hague: Martinus Nijhoff, 1999), 297 at 303 [Ziemele & Schram].

³⁸ Arendt, *supra*, note 31, at 278.

³⁹ *Ibid.*, 278 – 286.

their own misconduct, deprives them of one of the most fundamental rights which belongs to the individual in modern society.”⁴⁰ Scott also argues that “[t]here is no greater right or privilege than nationality; and because of its vast importance, its acquisition and its loss should be clearly defined and stated... there should be no stateless person in a world governed by law”.⁴¹ The preamble to the Hague Convention states that the parties were “convinced” that “it is in the general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have one nationality only”, and that they also recognized that the “ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases both of statelessness”.⁴² However, neither Garner nor Scott, not even the Hague Convention, challenged the sovereign power of a state to revoke the grant of its nationality. On the contrary Garner apparently accepted the power of states to denationalize persons for “criminal conduct”.⁴³ Thus, even though there has always been a general recognition of states’ unfettered rights to determine who should qualify or remain their citizens, some scholars still advocated and recognized the need for everyone to have at least one nationality.⁴⁴

2.0 INTERPLAY BETWEEN STATE SOVEREIGNTY AND RIGHT TO NATIONALITY

This interplay between state sovereignty and the right to nationality will be discussed in relation to, (a) Interplay between state sovereignty and the right under Article 15 of the UDHR and other relevant instruments, as reflected by modern nationality laws, and (b) impact of state sovereignty on the customary international law status of right to nationality.

⁴⁰ Garner, *supra*, note 7, at 552 – 553 (emphasis supplied).

⁴¹ Scott, *supra*, note 8, at ix.

⁴² The Hague Convention, second and third preambular paragraphs.

⁴³ See note 40 and the accompanying text above.

⁴⁴ See for example, Seckler-Hudson, *supra*, note 5, at 14; Pasquale Fiore, *Nouveau Droit International Public: Suivant Les Besoins de la Civilization Moderne*, translated by P. Pradier-Fodere (Paris: Auguste Durand & Pedone-Lauriel, 1868), at 119 [Fiore]; Albert Geouffre de Lapradelle & Jean Paulin Niboyet, eds, *Repertoire de Droit International*, Tome VIII (Paris: Recueil Sirey, 1930), 559; David Dudley Field, *Outlines of an International Code*, 2d ed (New York: Baker, Voorhis & Co, 1876), 130.

2.1 Right to Nationality and Nationality Laws

As discussed above, states historically have sovereign rights to determine their membership, including the power to revoke the nationality conferred on nationals whenever they deem fit. The exercise of this power to revoke nationality gave rise to two events that overshadowed the formulation of Article 15 of the UDHR. The first was the presence of large number of stateless refugees in Europe. These include the estimated two million refugees from the Russian civil war who were denationalized by Soviet Union in 1920s, millions of Armenians denationalized by Turkey, and millions of Jews denationalized by the Nazi Germany.⁴⁵ While the denationalization of these stateless refugees was generally deemed to be a legitimate exercise of the respective states' sovereign right to determine their membership, their presence in Europe was problematic for a variety of reasons, including the fact that the states could no longer expel the stateless people from their territory because no other state had the corresponding duty of receiving them. This was seen as a derogation of the sovereign rights of states to expel aliens from their territory.⁴⁶ The second event was the established link between the Holocaust and the denationalization of the Jews by the Nazi Germany.⁴⁷ It seems that it was in direct response to these two events that an earlier version of Article 15 of the UDHR had proposed that:

- (1) Everyone has a right to a nationality.
- (2) All persons who do not enjoy the protection of any government shall be placed under the protection of the United Nations. This protection shall not be accorded to criminals nor to those who acts are contrary to the principles and aims of the United Nations.⁴⁸

The above proposal was intended to serve a dual purpose. On one hand, the provision for a 'right to nationality' was designed to prevent further arbitrary deprivation of nationality.⁴⁹ On the other hand, the latter provision apparently recognized the presence of stateless people in Europe at that

⁴⁵ See notes 31 – 38 and the accompanying text above.

⁴⁶ See for example, Weis, *supra*, note 5, at 56, Arendt, *supra*, note 31, at 278 – 286.

⁴⁷ See generally, Ziemele & Schram, *supra*, note 37, at 300 – 301; Johannes Morsink, *The Universal Declaration of Human Rights; Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999) 80 – 83 [Morsink]; Mirna Adjami & Julia Harrington, "The Scope and Content of Article 15 of the Universal Declaration of Human Rights" (2008) 27:3 Refugee Survey Quarterly 93, at 96 [Adjami & Harrington].

⁴⁸ See Morsink, *supra*, note 47, at 80 – 81.

⁴⁹ See Ziemele & Schram, *supra*, note 37, at 301.

time; hence it sought to place them under the care of the United Nations (UN). While the first purpose would have been a direct challenge to the prevailing doctrine of exclusive states sovereignty on nationality matters, the second purpose was a bit cautious, in that it does not necessary challenge the sovereign right of the denationalizing states to denationalize the stateless refugees but it nonetheless acknowledged that such denationalized stateless people deserve some protection by reason of their statelessness. However, as noted in chapter two, the proposal to place the then stateless people under the care of the UN was ultimately rejected mainly because it would put a ‘heavy burden’ on the newly established UN and raise ‘false hope’.⁵⁰

As previously observed, the right to nationality has three elements, namely (a) everyone has right to a nationality, (b) the prohibition of arbitrary deprivation of an individual’s nationality, and (c) preservation of an individual’s right to change a nationality. The interplay between state sovereignty and each of these elements of the right will be considered below.

2.1.1 ‘Everyone has a Right to a Nationality’

A review of the UDHR drafting proceedings shows that there was a major challenge with this first element of Article 15, which ostensibly suggests that everyone has the *right* to [acquire] a nationality.⁵¹ The challenge arose mainly because it strikes at the heart of the jealously guarded sovereign right of every state to determine and regulate its citizenship.⁵² The resultant effect of this clash – or put differently, the impact of states sovereignty on this first element of right to nationality – may be discussed under three broad headings: (a) vagueness and imprecision of terms, (b) states withholding consent for unambiguous provisions, (c) absence of effective monitoring or enforcement mechanism.

⁵⁰ See pages 37 – 38 above.

⁵¹ The other two elements – prohibition against arbitrary deprivation of nationality and right to change nationality – are subsumed in the first element, since they presuppose the existence of (or an already exercised right to) a nationality.

⁵² See Morsink, *supra*, note 47, 83.

2.1.1.1 Vagueness and Imprecision

One major impact of state sovereignty on the first element of the right to nationality is that Article 15 of the UDHR is cautiously worded, such that it does not make any provision for *which* “nationality” *everyone* is entitled to.⁵³ Like Article 15 of the UDHR, the provisions of the ICCPR and CRC on nationality, as well as those of the Arab Charter and the European Convention on Nationality, are also cautiously drafted such that they fail to elaborate on *which* nationality every child or person is entitled to. These provisions are unlike an earlier draft Article 32 of the ICCPR and the Chilean proposal to Article 15 of the UDHR which sought to make everyone entitled to the nationality of the place he/she was born.⁵⁴

The failure to make adequate provision for *which* nationality ‘everyone’ is entitled to renders this element “vague and imprecise”,⁵⁵ and this allows states to essentially continue to retain their exclusive sovereignty to determine who can acquire their nationality.⁵⁶ For example, in affirming states sovereignty in respect of acquisition of nationality, the Human Rights Committee in its General Comment on Article 24(3) of the ICCPR (which like the UDHR fails to state which nationality every child is entitled to) stated *inter alia*:

While the purpose of this provision is to prevent a child from being afforded less protection by society and the State because he is stateless, *it does not necessarily make it an obligation for States to give their nationality to every child born in their territory.* However, States are required to adopt every appropriate measure, both internally and in

⁵³ See for example, Serena Forlati, “Nationality as a Human Right” in Alessandra Annoni & Serena Forlati, eds, *The Changing Role of Nationality in International Law* (Abingdon, Oxon: Routledge, 2013), 18 at 19 [Forlati]: the author identified the “reluctance shown by states in giving up their discretion in [nationality] matters” and “absence of universally accepted standards on attribution of nationality” as the reason for absence of clarity as to which nationality everyone is entitled to. Cf. Ashild Samnøy, “The Origins of the Universal Declaration of Human Rights” in Gudmundur Alfredsson and Asbjørn Eide, eds., *The Universal Declaration of Human Rights; A Common Standard of Achievements* (The Hague: Kluwer Law International, 1999), 3 at 15: the author suggested that the “hazy formulation” of the right to nationality in Article 15 was designed to avoid controversy and to “allow ample room for interpretation”.

⁵⁴ See page 37 above.

⁵⁵ Chan, *supra*, note 2, at 3.

⁵⁶ *Ibid.*

cooperation with other States, to ensure that every child has a nationality when he is born.⁵⁷

The failure of the relevant instruments to elaborate on *which* nationality *everyone* is entitled to also renders the right to nationality virtually unenforceable, and as aptly observed by Forlati, “[i]t is still difficult to identify in all situations the state against which affected individuals are entitled to invoke their right to acquire a nationality”.⁵⁸

2.1.1.2 Withholding Consent for Unambiguous Provisions

A fundamental principle of international law is that consent of states is generally required in order for the state to be bound to observe principles of international law, especially in relation to treaty provisions.⁵⁹ Thus, where a state is not party to the relevant international instrument, the default position of international law is that the instrument will not apply to that state – unless such instrument embodies customary international law or creates obligation *erga omnes*.⁶⁰

A review of the status of some relevant instruments shows that a vast majority of states generally do not consent to any instrument containing unambiguous provisions on the right to nationality, especially if such instrument seeks to impose any positive duty on them to grant nationality to

⁵⁷ Office of the United Nations High Commissioner for Human Rights, “General Comment No. 17: Rights of the child (Art. 24)” 4 July 1989 (Thirty-fifth session), online: UNHCR <<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/cc0f1f8c391478b7c12563ed004b35e3?OpenDocument>>.

⁵⁸ Forlati, *supra*, note 53, at 20. See also Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law*, (Oxford: Oxford University Press, 2012), 48-49 [Kesby].

⁵⁹ This principle is also expressed by the Latin maxim *pacta tertiis nec nocent nec prosunt*, which means that a treaty applies only between the parties to it. See Article 34 of the Vienna Convention on the Law of Treaties ((1969), U.N.T.S. Vol. 1155, 331): “A treaty does not create either obligations or rights for a third State without its consent.”

⁶⁰ See generally, Malcom N. Shaw, *International Law*, 6th ed, (Cambridge: Cambridge University Press, 2008), 1 – 30 [Shaw]; Rafael Nieto-Navia, “International Peremptory Norms (Jus Cogens) and International Humanitarian Law” in Vohrah Lal Chand *et al*, eds., *Man’s Inhumanity to Man, Essays in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003), 595 [Nieto-Navia]; Ian Brownlie, *Principles of Public International Law*, 6th ed, (Oxford: Oxford University Press, 2003), 1 – 25; Rebecca M.M. Wallace, *International Law*, 5th ed, (London: Sweet & Maxwell, 2005) [Wallace]; Mark Freeman & Gibrán Van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) [Freeman & van Ert].

stateless persons. An example of the exercise of states' power to withhold consent was used in relation to the existing stateless people during and after the UDHR debate. Following the rejection of the proposal to place the existing stateless people under the care of the newly established UN, the UN Commission on Human Rights in 1947 adopted a Resolution on Stateless Persons which called for "early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any government, in particular pending the acquisition of nationality as regards their legal and social protection and their documentation."⁶¹ In pursuance of this resolution, the UN Economic and Social Council (ECOSOC) adopted resolution 116 (VI) D on Stateless Persons in March 1948, wherein it noted the need to adopt "interim measures to afford protection to stateless persons", and to take "joint and separate action... to ensure that everyone shall have an effective right to a nationality". It also requested the Secretary-General to *inter alia* (a) "undertake a study of the existing situation in regard to the protection of stateless persons... and to make recommendations on the interim measures which might be taken by the United Nations", and (b) "undertake a study of national legislation and international agreements and conventions relevant to statelessness, and to submit recommendations to the Council as to the desirability of concluding a further convention on this subject."⁶²

Consequent upon the above mandate, the Secretary-General produced his 1949 *Study of Statelessness*,⁶³ in which he outlined measures to improve the status of stateless persons and the elimination of statelessness.⁶⁴ To improve the status of stateless persons, he recommended an international agreement that would determine the principal elements of the status of stateless persons, and also include rights to be granted to them.⁶⁵ He also recommended two principles that will eliminate the sources of statelessness (a) every child must receive a nationality at

⁶¹ See UNECOSOCOR, Third Year, sixth session, Supplement No. 1, 13 – 14.

⁶² Text of the resolution cited in Hugh Massey, *Legal and Protection Policy Research Series: UNHCR and De Facto Statelessness* (Geneva: United Nations High Commissioner for Refugees, 2010) 5, available online: Refworld <<http://www.refworld.org/pdfid/4bbf387d2.pdf>>.

⁶³ United Nations Economic and Social Council, A Study of Statelessness, E/1112;E/1112/Add.1 (August 1949), online: Refworld <<http://www.refworld.org/pdfid/3ae68c2d0.pdf>>.

⁶⁴ *Ibid*, at 10.

⁶⁵ *Ibid*, at 43 – 55.

birth,⁶⁶ and (b) no person should lose his/her nationality unless he/she has acquired a new one.⁶⁷ Pursuant to these recommendations, the International Law Commission (ILC) prepared some important instruments for adoption, including (a) the draft Convention on the Status of Stateless Person, (b) draft Convention on the Elimination of Future Statelessness, (c) Protocol on the Elimination of Present Statelessness, (d) Protocol on the Reduction of Present Statelessness, and (e) draft Convention on the Reduction of Future Statelessness.

The preamble to the Draft Convention on the Elimination of Future Statelessness⁶⁸ declared that “statelessness often results in suffering and hardship shocking to conscience and offensive to the dignity of man” and that “statelessness is inconsistent with the existing principle which postulates nationality as a condition of the enjoyment by the individual of certain rights recognized by international law”.⁶⁹ Article 1 of the draft provides that “[a] person who would otherwise be stateless shall acquire at birth the nationality of the Party in whose territory he is born”. More importantly, Article 11 of the draft sought to establish, within the framework of the United Nations, an agency to act on behalf of stateless persons before Governments or before a tribunal which will also be established to decide any dispute between them concerning the interpretation or application of the Convention and to decide complaints presented by the agency on behalf of a person claiming to have been denied nationality in violation of the provisions of the draft convention. Similarly, Article 1 of the draft Protocol on the Elimination of Present Statelessness⁷⁰ provides that “the Parties shall confer their nationality on stateless persons born in their territory before the coming into force of the Convention on the Elimination of Future Statelessness, if such persons did not acquire a nationality at birth”. Articles 5-8 of the draft oblige states to “reinstate into their nationality” stateless persons who have lost the nationality of

⁶⁶ *Ibid*, at 135 – 138.

⁶⁷ *Ibid*, 138 – 140. See also Chan, *supra*, note 2, at 3 – 4.

⁶⁸ Text adopted by the International Law Commission at its sixth session, in 1954, the text appears in *Yearbook of the International Law Commission, 1954*, vol. II, available online: UN <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/6_1_1954_1.pdf> [*Report of ILC to UNGA*].

⁶⁹ *Ibid*, third and fifth preambular paragraphs.

⁷⁰ Text of the draft Protocol contained in Annexure I to Document No. A/CN.4/75, “Nationality Including Statelessness – Second Report on the Elimination or Reduction of Statelessness by Mr. Roberto Cordova, Special Rapporteur” (1953) *Yearbook of the International Law Commission*, vol. II, 197 – 199 [*Nationality Including Statelessness*].

the respective state as a result of enumerated factors such as: change in personal status, by renunciation, by seeking naturalization in a foreign country or by obtaining an expatriation permit, on the ground of departure, stay abroad, failure to register or any similar ground.⁷¹

The above drafts not only sought to impose specific obligations on states in respect of “eliminating” both present and future statelessness, they also sought to establish an agency or tribunal to act on behalf of stateless persons against government. However, the drafts were vigorously opposed by some ILC members. According to Godwin-Gill:

Some ILC members stressed the sovereignty and internal jurisdiction dimensions to nationality, and considered that the State could not be denied the right to deprive of their nationality anyone who had put themselves outside their national community. Other members stressed that, while deprivation should not be imposed as a penalty, nationality was nevertheless a privilege not to be accorded unless there were a real link between individual and State. In the eyes of some, the “mere fact of birth” or “mere habitual residence” in a country before the age of eighteen was not sufficient evidence of such a link. Others agreed, while noting also that approaches to the acquisition of nationality transcended purely legal principles.⁷²

The draft instruments on ‘elimination’ of statelessness were ultimately rejected because it was considered not “feasible to suggest measures for the total and immediate elimination of present statelessness”.⁷³ The solutions offered by the draft Protocol on the Reduction of Present Statelessness were also considered not acceptable to states.⁷⁴ Thus, at the United Nations Conference on the Elimination or Reduction of Future Statelessness held in Geneva from 24

⁷¹ The provisions of the draft convention and protocol on the ‘reduction’ of present and future statelessness are similar to the draft on ‘elimination’. The main difference between them is that the ‘reduction’ instruments were proposed as alternative to the ‘elimination’ instruments and intended to apply in “so far as... total elimination is not possible”. The ‘reduction’ instruments essentially qualify the relative absoluteness of states obligation in relation to statelessness, that is, from ‘eliminating’ to ‘reducing’ statelessness. Text of the draft Protocol on the Reduction of Present Statelessness is contained in Annexure II to Nationality Including Statelessness, *supra*, at 198. The draft Convention on the Reduction of Future Statelessness is contained in Report of ILC to UNGA, *supra*, note 68, at 143.

⁷² Guy S. Godwin-Gill, “Convention on the Reduction of Statelessness” (UN, 2011), at 2, online: UN Treaty <<http://untreaty.un.org/cod/avl/ha/crs/crs.html>>; citing Yearbook of the International Law Commission, 1952, vol. I, pp. 100 – 142, 190 – 191, 244, 251 – 252. [Godwin-Gill].

⁷³ See Report of ILC to UNGA, *supra*, note 68, at 147, para. 29.

⁷⁴ *Ibid.*

March to 18 April 1959, and in New York from 15 to 28 August 1961, the states delegates opted to use the draft convention on the *reduction* of statelessness as the basis for discussion, and focused on provisions aimed at reducing statelessness at birth.⁷⁵ At the Conference, many states defended their power to deprive people of their nationality as being “essential to their vital interests”.⁷⁶ The rejection of these drafts evidenced the desire of most states to hold on to their power to denationalize persons and also avoid any positive obligation to grant nationality to existing and future stateless people. Furthermore, as noted above, one reason for the conception of a right to nationality under the UDHR was to encourage states to grant nationality to existing stateless people. The rejection of these drafts arguably defeated this purpose and inevitably sealed the fate of the existing stateless people.

Another evidence of the predisposition of states to use their sovereign power of consent is deducible from the numbers of states that have adopted or ratified the relevant international instruments on right to nationality and reduction of statelessness. For example, even though the Convention on the Reduction of (future) Statelessness (CRS) mainly seeks to “reduce” the increasing cases of statelessness without essentially negating the sovereignty of States in nationality matters, only 53 countries (excluding major powers like the US, China, India, Russia, and also Burma and Kuwait) are parties to the Convention to date.⁷⁷ Even among the few states that have ratified the Convention, a large number of them made reservations to provisions that imposed obligations on them to grant nationality to persons born in their territory who would be otherwise stateless, or restrict their power to deprive people of their nationality.⁷⁸ Similarly, only 78 countries (excluding major powers like the US, Canada, Russia, India, and also Burma and Kuwait) are parties to the Convention Relating to the Status of Stateless Persons (CRSSP), even though it merely seeks to ameliorate the travails of stateless persons without imposing any duty

⁷⁵ Godwin-Gill, *supra*, note 72, at 5.

⁷⁶ *Ibid*, citing Note by the Secretary-General with Annex containing observations by Governments on deprivation of nationality (A/CONF.9/10, 9 June 1961, Add. 1-3, 5 July 1961).

⁷⁷ Status update as at 20 August 2013, online: United Nations Treaty Collection <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en>.

⁷⁸ For example, Austria, Brazil, Republic of Ireland, Jamaica, Lithuanian, New Zealand, Tunisia and the UK retain the right to deprive citizens of their nationality in circumstances set out in their respective reservations. Germany restricted the obligation to grant nationality to persons born in its territory to “German nationals” only.

on the states to grant them citizenship.⁷⁹ In relation to regional instruments, neither the US nor Canada has adopted the American Convention. Similarly, even though the European Convention on Nationality affirms States' sovereignty on nationality, regional powers like the UK, Russia, France, Spain, Italy, Greece, etc., have not ratified the Convention.⁸⁰

Another indication of the predisposition of states to use their sovereignty in this regard may be deduced from the numbers of reservations made to the provisions of the various international instruments on right to nationality. The Vienna Convention on the Law of Treaties defines a reservation as “a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization”.⁸¹ According to Shaw, the “capacity of a state to make reservations to an international treaty illustrates the principle of sovereignty of states.”⁸² States generally exercise their sovereign power to make reservations as a means of refusing consent to unwanted provisions in a treaty, especially human rights instruments, so that they are not bound to observe such provisions.⁸³

⁷⁹ Status update as at 20 August 2013, online: United Nations Treaty Collection <http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en>.

⁸⁰ Status, as of 26 April 2013, available online: Council of Europe <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=166&CM=&DF=&CL=ENG>>.

⁸¹ Vienna Convention, *supra*, note 59, Article 2.

⁸² Shaw, *supra*, note 60, at 914.

⁸³ *Ibid.* See also Lawrence R. Helfer, “Not Fully Committed? Reservation, Risk, and Treaty Design” (2006) 31 YJIL 367 at 369; Francesco Parisi & Catherine Sevcenko, “Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention” (2003) 21 Berkeley J. Int'l Law 1 at 1 – 2; Eric Neumayer, “Qualified Ratification: Explaining Reservations to International Human Rights Treaties” (2007) 36:2 Journal of Legal Studies 397, at 397 – 399; Alain Pellet & Müller Daniel, “Reservations to Treaties: An Objection to a Reservation is Definitely not an Acceptance” in Enzo Cannizzaro, ed., *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press, 2011) 38; Bruno Simma & Gleider I. Hernández, “Legal Consequences of an Impermissible Reservation to a Human Rights Treaty: Where Do We Stand?” in Enzo Cannizzaro, ed., *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press, 2011) 61.

Some states have used this power to make reservations to reject obligations to respect the right to nationality provisions in some of the widely adopted international instruments, such as the ICCPR, CRC, and CEDAW. As stated above, under Article 9 of CEDAW contracting states were obliged to grant women equal rights with men with respect to the nationality of their children. However, Kuwait and virtually all the other Middle Eastern Countries made reservations to this provision.⁸⁴ Kuwait also made similar reservations to Article 7 of the CRC which provides that every child has a right to nationality.⁸⁵

2.1.1.3 Absence of Effective Monitoring or Enforcement Mechanisms

A corollary of the vagueness and imprecision of provisions relating to the right to nationality is the general absence of effective monitoring and enforcement mechanisms in most instruments providing for the right to nationality. A review of the relevant instruments on the right to nationality reveals the extent to which states sovereignty stifles the enforcement of the right to nationality. First, while some instruments (especially those that provide for a general right to nationality such as the ICCPR, CRC, CEDAW, and CERD) contain provisions which establish monitoring agencies, such monitoring agencies usually adopt a cautious approach to the issue of right to nationality, that is, they either totally ignore the provision on the right to nationality or they affirm states sovereignty in this regard.

For example, Article 17 of CEDAW establishes the Committee on the Elimination of Discrimination against Women to monitor “the progress made in the implementation” of the Convention. In its Recommendation No 21 on Article 9 of the Convention, which *inter alia* obliges states parties to “grant women equal rights with men with respect to the nationality of

⁸⁴ Status update, as at 20 August 2013, online: United Nations Treaty Collection <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en>.

⁸⁵ The United Arab Emirates, for example, took “the view that the acquisition of nationality is an internal matter and one that is regulated and whose terms and conditions are established by national legislation”. Status update, as at 20 August 2013, online: United Nations Treaty Collection. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en>.

their children”, the Committee made no reference to the obligation on the right to nationality.⁸⁶ Thus, the Committee failed to address the increasing number of statelessness arising from the discrimination against women; for example, children born of Kuwaiti women to stateless Bidoon fathers are stateless under Kuwaiti law. Similarly, and as noted above, the Human Rights Committee in its General Comment on Article 24(3) of the ICCPR affirmed states sovereignty in respect of acquisition of nationality in stating that the ICCPR *does not necessarily make it an obligation for States to give their nationality to every child born in their territory*.⁸⁷

Second, states generally vigorously opposed the establishment of any agency or tribunal with adjudicatory jurisdiction or oversight functions in respect of nationality matters. For example, as noted above, Article 11 of the two draft conventions on ‘elimination’ and ‘reduction’ of future statelessness sought to establish a tribunal which will decide complaints presented on behalf of a person claiming to have been denied nationality in violation of the provisions of the draft convention.⁸⁸ However, the adopted CRS not only removed every reference to the establishment of such adjudicatory tribunal in its Article 11, it also whittled down the powers of the agency contemplated in the draft by providing merely for the establishment of a “body” to *which a person claiming the benefit of the CRS may apply for the examination of his claim and for*

⁸⁶ Committee on the Elimination of Discrimination against Women, General Recommendation No. 21 (13th session, 1994), available online: UN

<<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>>.

⁸⁷ See notes 57 – 58 and the accompanying text above. Cf, Committee on the Elimination of Racial Discrimination, General Recommendation No.30, “Discrimination Against Non Citizens” (10/01/2004), paras. 13 – 17, available online: UNHCHR

<<http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/e3980a673769e229c1256f8d0057cd3d?OpenDocument>>.

⁸⁸ In order to give effect to the drafts, Demark submitted a draft protocol on the establishment of a tribunal relating to convention on the reduction of statelessness, Article 1 of which sought to establish a “tribunal which shall be competent to decide any dispute between them concerning the interpretation and application of this Convention, which cannot be settled by other means, and to decide complaints presented... on behalf of a person claiming to have been denied nationality in violation of the provisions of this Convention”. See UNGA, “Demark: Draft Protocol on the Establishment of a Tribunal Relating to Convention on the Reduction of Statelessness”, A/Conf.9/L.61, 15 April 1959 [Limited], available online: UN <http://untreaty.un.org/cod/diplomaticconferences/statelessness-1959/docs/english/Vol_1/82_A_conf_9_1-61.pdf>.

*assistance in presenting it to the appropriate authority.*⁸⁹ In spite of the whittling down, some states, for example France, Niger and Tunisia, still made reservations to Article 11 of the CRS!⁹⁰

The combined effect of the above-mentioned (i) vagueness and imprecision of provisions relating to the right to nationality, (ii) the predisposition of states to exercise of sovereign power to withhold consent, and (iii) the absence of effective implementation and monitoring mechanism, is that states still virtually have unbridled power to determine who and who are entitled to be their nationals. This, however, does not negate the existence or validity of this first element of the right to nationality under international law; it rather goes to the issue of enforceability. In other words, it is difficult to enforce the provisions of the relevant instruments against any state, like Latvia for example who, as shown in chapter two, has ratified all the relevant instruments without making any reservation. The level of difficulty increases in respect of Kuwait who has ratified, but made reservations to, some of the relevant international instruments. It increases further in relation to Burma who is not party to most of the relevant instruments.

2.1.2 Prohibition against Arbitrary Deprivation of Nationality

As deducible from the review of the UDHR drafting committee proceedings, most states had no problem conceding to a prohibition against arbitrary deprivation of nationality, perhaps due to the fact that the inclusion of the qualifier “arbitrary” to the provision implicitly acknowledges states’ sovereign power to denationalize – subject only to the qualification that the exercise of such power should not be ‘arbitrary’.

One of the disputes that arose during the UDHR draft committee proceedings relates to the proper meaning of the word ‘arbitrary’ that qualifies the prohibition against deprivation of nationality. The USSR and Turkish delegates believed that it denotes ‘illegally’, while Uruguay

⁸⁹ Article 11, CRS.

⁹⁰ See status update of the CRS as at 2 September 2013, available online <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en>.

delegates invoked the ‘metaphysical’ to argue that the term involves principles of natural justice or natural law.⁹¹ The Greek delegate opined that the word arbitrary was “satisfactory because it covered all action not in conformity with the law”,⁹² while the French delegate (Cassin) believed that the word had a “twofold meaning: no one could be deprived of nationality contrary to existing laws, and those laws themselves must not be arbitrary”.⁹³ Perhaps in deference to state sovereignty on nationality issues, Cassin further argued that the use of the word arbitrary “was an admonition to Governments; it did not represent any encroachment upon their rights”.⁹⁴ Ultimately, there was no consensus as to its meaning, although it was generally understood to denote something “unlawful”.⁹⁵

While it is unclear from the proceedings whether the ‘unlawful’-ness relates to municipal law or international law, Cassin’s insistence that the word is an “admonition to Governments” and that it does not encroach “upon their rights” tends to suggest that the *unlawfulness* does not relate to a breach of international law. It thus becomes arguable that the ‘arbitrary’ qualification means that such deprivation should not be contrary to the law of the relevant country, and as Cassin suggested the relevant law itself should also not be made arbitrarily.

It is therefore arguable that even though modern citizenship laws contain provisions for loss or revocation of nationality,⁹⁶ such provisions nonetheless are made in deference to this second element of the right to nationality, and they essentially comply with the aspirations of Article 15 of the UDHR.

⁹¹ Morsink, *supra*, note 47, at 82.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ See for example, Section 30(1) of the Nigerian Constitution which permits the President to revoke the citizenship of a naturalized citizen if such a person has, within a period of seven years after becoming naturalized, been sentenced to imprisonment for a term of not less than three years. See also, Article 16 of Pakistan, *supra*, note 20; Article 9 of China, *supra*, note 20; Article 9 of Zambia, *supra*, note 29; Sections 7 and 8 of Canada, *supra*, note 23; Article 14 of Kuwait, *supra*, note 27.

2.1.3 Right to Change Nationality

Just like the second element, the review of UDHR drafting proceedings also suggests that most states had little problem with this third element (“right to change nationality”). There was hardly any opposition to this provision. This provision has the most successful impact on modern nationality laws, as the nationality laws of virtually all States allow individuals to renounce their nationality and thus generally give effect to every individual’s right to change nationality. For example, Gérard Depardieu, a famous French actor, recently (2013) renounced his French citizenship and accepted to become a Russian merely because he was reportedly ‘so exasperated’ with French taxes and the French government.⁹⁷ Rene Gonzalez, a member of the “Cuban Five” spy group also recently renounced his United States citizenship in order to continue to stay in Cuba.⁹⁸ Eduardo Saverin, one of Facebook's four co-founders, has renounced his U.S. citizenship allegedly to avoid paying US taxes.⁹⁹

Article 7 of CRS provides that the State law which permits renunciation of nationality should ensure that such renunciation is conditioned upon the person concerned possessing or acquiring another nationality. In compliance with this provision (or, at least bearing the provision in mind), the nationality laws of several countries, including those who are not even parties to the CRS, contain provisions which make renunciation of nationality subject to the acquisition of another

⁹⁷ See Scott Sayare, “Actor Renounces His Citizenship in Snit Over French Tax Burden”, The New York Times 16 December 2012, online: New York Times <http://www.nytimes.com/2012/12/17/world/europe/gerard-depardieu-says-he-is-giving-up-french-citizenship.html?_r=0>; David Herszenhorn, “That Russian Movie Star Gérard Depardieu”, The New York Times 3 January 2013, online: New York Times <<http://www.nytimes.com/2013/01/04/world/europe/putin-makes-gerard-depardieu-a-citizen-of-russia.html>>.

⁹⁸ See Patrick Oppmann, “‘Cuban Five’ spy renounces U.S. citizenship to stay on island”, CNN 6 May 2013, online: CNN <<http://www.cnn.com/2013/05/06/world/americas/cuba-spy-citizenship>>; Tom Brown, “U.S. judge rules Cuban spy can stay in Cuba if U.S. citizenship renounced” Reuters 3 May 2013, online: Reuters <<http://www.reuters.com/article/2013/05/03/us-usa-cuba-spy-idUSBRE9420YP20130503>>.

⁹⁹ See David Goldman, “Facebook co-founder renounces U.S. citizenship”, CNNMoneyTech 11 May 2012, online: CNNMoneyTech <<http://money.cnn.com/2012/05/11/technology/eduardo-saverin-facebook-citizenship/>>.

nationality.¹⁰⁰ However, by way of protecting states' interest and affirming state sovereignty, the nationality laws of some countries also contain provisions that invalidate any exercise of the right to change nationality when the relevant country is involved in a war.¹⁰¹

3.0 IS THE RIGHT TO NATIONALITY CUSTOMARY INTERNATIONAL LAW?: IMPACT OF STATE SOVEREIGNTY

As noted in chapter two, *some* of the human rights provisions of the UDHR are now considered as customary international law.¹⁰² This raises the question of whether the right to nationality may be considered as being part of customary international law, in view of the plurality of international/regional instruments bordering on right to nationality and reduction of statelessness, and the impact of the right to nationality on modern nationality laws of states. The answer to this question will determine the extent to which (a) Burma is obligated to respect the right to nationality of the Rohingyas, since it is not a party to most of the relevant international instruments, and (b) the extent to which Kuwait is obligated to respect the right to nationality of the Bidoons, notwithstanding the reservations it has made in respect of the various international instruments. The purpose of this section is to examine the impact of states' sovereignty on the question of whether the right to nationality forms part of customary international law.

¹⁰⁰ See for example Section 9(1) of Canada, *supra*, note 23; Article 5.1 of Pakistan, *supra*, note 20, Article 11 of China, *supra*, note 20; Section 349(a)(5) of the Immigration and Nationality Act (INA) (8 U.S.C. 1481(a)(5) [USA].

¹⁰¹ See for example, section 29(3)(1)(a) of the Nigerian Constitution.

¹⁰² For a general discussion on customary international law, see: Anthony D'Amato, "The Concept of Special Custom in International Law (1969) 63 Am. J Int'l L. 211; Anthony D'Amato, "Human Rights as Part of Customary International Law: A Plea for Change of Paradigms" (1995-6) 25 Ga. J. Int'l & Comp. L. 47, at 52-54; Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010), 1 – 6 [Lepard]; Karol Wolfke, *Custom in Present International Law*, 2d ed. (Dordrecht: Martinus Nijhoff, 1993), 1 – 9 [Wolfke]; James Leslie Brierly, *The Law of Nation: An Introduction to the International Law of Peace*, 6d ed, (Oxford: Clarendon Press, 1963), 59 – 62; Shaw, *supra*, note 60, at 72 – 93; Wallace, *supra*, note 60, at 7 – 25; Jonathan I. Charney, "The Persistent Objector Rule and the Development of Customary International Law" (1985) 56:1 BYIL 1 – 24; Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation" (2001) 95 Am. J Int'l L. 757, at 757 – 763.

Like many legal issues, the concept of customary international law is, as Wolfe succinctly puts it, a “notoriously controversial character”.¹⁰³ Article 38(1)(b) of the Statute of the International Court of Justice¹⁰⁴ describes customary international law as “evidence of a general practice accepted as law”. Like most authors, Lepard opines that a customary practice among states can evolve into a customary legal norm binding on all States if (a) the practice is consistent among States and endures over a period of time, and (b) States believe the practice is legally binding (*opinio juris*).¹⁰⁵ More importantly, he also argued that “the general recognition by at least most states of a practice’s obligatory character is sufficient to bind all states, even those that have not explicitly consented to it, including new states, unless they qualify as ‘persistent objector’ to the practice.”¹⁰⁶ That being the case, the right to nationality will be regarded as part of customary international law and will, thus, *bind all states* if there is “general practice” signaling recognition of the right by *most* states as some form of “legal obligation” (*opinio juris*).¹⁰⁷

In determining whether *most* states recognize the right to nationality as such, it is useful to, once again, consider some states’ practices in relation to each of the three elements of nationality discussed above. As previously noted, modern citizenship laws contain provisions which permit renunciation of citizenship. They also contain provisions relating to revocation or loss of nationality. While the extent to which presence of such provisions in modern nationality laws indicates states’ recognition of the right of every individual to change his/her nationality or states’ acceptance of the prohibition against arbitrary deprivation of nationality remains unclear, the existence of such provisions nonetheless greatly supports Forlati’s contention that the right to

¹⁰³ Wolfke, *supra*, note 102, at 9.

¹⁰⁴ United Nations, *Statute of the International Court of Justice*, 18 April 1946.

¹⁰⁵ Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010), 6 [Lepard]. See also the decision of the ICJ in *Nicaragua v. USA (merits)*, ICJ Rep, 1986, 14 at 97: “custom is constituted by two elements, the objective one of ‘general practice’ and the substantive one of ‘accepted by law’ (*opinio juris*).”

¹⁰⁶ Lepard, *supra*, note 105, at 7.

¹⁰⁷ The reference to *most states* throws up the question of how to determine *most* states: is it determined simple majority? Does it matter if, for example, the state practices of one or more members of the veto-wielding *permanent* members of the UN Security Council (US, Russia, France, Britain and China) do not indicate recognition of right to nationality as a legal obligation? A resolution of this question is outside the scope of this thesis.

“retain [prohibition against arbitrary deprivation] and to change” an individual’s nationality are “by now part of customary international law.”¹⁰⁸

The position of the first element (“everyone has a right to nationality”) is again problematic, especially in view of states practice on the vexed issue of citizenship. An indication of states practice on this issue is deducible from the apathetic response of the international community, represented by the UNGA, to Rohingyas’ nationality travails since 1992 when it passed Resolution 47/144 expressing “deep concern” about the Rohingyas’ plight.¹⁰⁹ After this resolution, subsequent UNGA resolutions on the situation in Burma merely typically deplore “the continued violations of human rights” “directed against persons belonging to ethnic and religious minorities”¹¹⁰ without making any specific reference to the Rohingyas or their nationality travails; even though such resolutions were usually based on UN Special Rapporteurs reports which always contain detailed information on the nationality travails of the Rohingyas (sometimes referred to as “Muslim communities”).¹¹¹ The UN Security Council (UNSC) has also held several proceedings and issued several statements on the human rights situation in Burma

¹⁰⁸ Forlati, *supra*, note 53, at 20. See also ECJ, *Rottmann v Freistaat Bayern*, C-135/08, judgment (GC) of 2 March 2010, para. 53: describes prohibition against arbitrary deprivation of nationality under Article 15(2) of UDHR as a “general principle of international law”.

¹⁰⁹ UNGA, Situation in Myanmar, A/RES/47/144 (December 1992), ninth preambular paragraph.

¹¹⁰ See for example, UNGA, Situation of Human Rights in Myanmar, A/RES/48/150 (January 1994) para. 7; UNGA, Situation of Human Rights in Myanmar, A/RES/52/137 (March 1998), paras. 19-20; UNGA, Situation of Human Rights in Myanmar, A/RES/53/167 (February 1999), paras. 16-17; UNGA, Situation of Human Rights in Myanmar, A/RES/54/186 (February 2000), paras. 13-16; UNGA, Situation of Human Rights in Myanmar, A/RES/55/112 (March 2001), paras. 14-15; UNGA, Situation of Human Rights in Myanmar, A/RES/56/231 (February 2002), paras. 18-19; UNGA, Situation of Human Rights in Myanmar, A/RES/57/231 (March 2003), para. 3; UNGA, Situation of Human Rights in Myanmar, A/RES/58/247 (March 2004), para. 3; UNGA, Situation of Human Rights in Myanmar, A/RES/59/263 (March 2005), para. 3; UNGA, Situation of Human Rights in Myanmar, A/RES/60/233 (March 2006), para. 2; UNGA, Situation of Human Rights in Myanmar, A/RES/61/232 (March 2007), para. 2; UNGA, Situation of Human Rights in Myanmar, A/RES/62/222 (February 2008), para. 2; UNGA, Situation of Human Rights in Myanmar, A/RES/63/245 (January 2009), para. 2.

¹¹¹ See for example, UNECOSOC, Situation of Human Rights in Myanmar E/CN.4/2006/34 (February 2006); UNECOSOC, Report on the Situation of Human Rights in Myanmar E/CN.4/2002/45 (January 2002), paras. 66-68; UNECOSOC, Situation of Human Rights in Myanmar E/CN.4/2004/33 (January 2004), paras. 43-45; UNGA, Situation of Human Rights in Myanmar A/60/221 (August 2005), paras. 79-80; UNGA, Situation of Human Rights in Myanmar A/61/369 (September 2006), para. 49.

without making any reference to the Rohingyas or their nationality travails.¹¹² In other words, even though the UNGA/UNSC has always been aware of the nationality travails of the Rohingyas, UNGA/UNSC resolutions or statements usually avoid making any reference to them.

There are two possible alternative explanations for the above failure to make any specific reference to the Rohingyas or their nationality travails. First, the continued allusion to “ethnic and religious minorities” in the UNGA resolutions suggests that the UNGA does not *recognize* the denationalization of the Rohingyas by the 1982 Citizenship Law – in which case, it continues to regard the Rohingyas as Burmese citizens. If this is the case, it would represent a fundamental departure from the traditional disposition of states not to interfere in other states’ exercise of a jealously guarded sovereign right to determine who their nationals are. The second possible explanation is that UNGA is adopting a cautious position by choosing to ignore the nationality travails of the Rohingyas, in line with the traditional attitude of states not to interfere in the nationality issues of another. This latter explanation seems to be the more likely reason for the failure to make any such reference. This suggests a general absence of states’ practice recognizing a ‘right’ to nationality as such.

However, it is necessary to observe the relative improvement in international response *via* the UNGA resolutions to the Rohingyas nationality travails following the highly publicized ‘boat-people’ incidence of January 2009.¹¹³ Consequently, post-2009 resolutions on Burma now make specific reference to the “Rohingya” and their nationality travails. For example, the UNGA in its Resolution of 15 November 2010 “[e]xpresses its concern about the continuing discrimination, human rights violations, violence, displacement and economic deprivation affecting numerous ethnic minorities, including, but not limited to, the Rohingya ethnic minority in Northern Rakhine State, and calls upon the Government of Myanmar to take immediate action to bring about an improvement in their respective situations, and to grant citizenship to the Rohingya

¹¹² See for example, UNSC, Statement by the President of the Security Council S/PRST/2007/37, October, 2007; UNSC, Statement by the President of the Security Council S/PRST/2008/13, May, 2008; UNSCOR, 61st Year, 5526 Mtg, S/PV.5526 (2006) [provisional]; UNSCOR, 62d Year, 5753 Mtg, S/PV.5753 (2007) [provisional]; UNSCOR, 63d Year, 5854 Mtg, S/PV.5854 (2008) [provisional]; UNSCOR, 64th Year, 6161 Mtg, S/PV.6161 (200) [provisional].

¹¹³ See note 51 of chapter one, and the accompany text.

ethnic minority.”¹¹⁴ The Human Rights Council in March 2013 also passed a Resolution which urges the Burmese government to “repeal and/or amend laws that deny the Rohingya, *inter alia*, the right to birth registration, the ability to marry and freedom of movement, including equal access to citizenship, through a full review of the Citizenship Law of 1982 to ensure that it conforms to international obligations defined in treaties to which the Government of Myanmar is a party, including their right to a nationality”.¹¹⁵ Similarly, the UNGA Human Rights Committee, on 19 November 2013, passed a Resolution which also urges Burma to grant citizenship to the Rohingyas.¹¹⁶ The Burmese government rejected the above resolutions.

Although the above recent resolutions are a welcome development which may suggest a gradual trend towards states’ recognition of nationality as a human right worthy of protection, the resolutions presently do not have any impact on the nationality travails of the Rohingyas, as the Burmese government still maintains that the Rohingyas are foreigners in Burma. It accuses the UN of impinging on its sovereignty by the above-mentioned resolutions.¹¹⁷

Another indication of states’ practice suggesting absence of recognition is deducible from the number of states that have adopted or ratified the various international instruments on right to nationality and reduction of statelessness. For example, as stated above, only 53 and 78 countries (excluding major powers like the US, China, Canada India, Russia, and also Burma and Kuwait)

¹¹⁴ UNGA, Situation of Human Rights in Myanmar A/C.3/65/L.48/Rev.1 (November 2010), para. 14 [Limited]. See also UNGA, Situation of Human Rights in Myanmar A/C.3/66/L.55 (October 2011), para. 17 [Limited].

¹¹⁵ UNGA, Situation of Human Rights in Myanmar A/HRC/22/L.20/Rev.1 (March 2013), para. 8 [Limited].

¹¹⁶ GA/SHC/4091, 19 November 2013, online: UN <<http://www.un.org/News/Press/docs/2013/gashc4091.doc.htm>>; See also Michelle Nichols, “UN Committee Slaps Syria, Iran, North Korea, Myanmar for Human Rights Abuses” *Reuters* (19 November 2013), online: Reuters <<http://www.reuters.com/article/2013/11/20/us-rights-un-idUSBRE9AJ01A20131120>>.

¹¹⁷ See “Burma Rejects UN Resolution on Rohingya Muslims” *Voice of America* (21 November 2013), online: VOA <<http://www.voanews.com/content/reu-burma-rejects-un-resolution-on-rohingya-muslims/1794749.html>>; “Government says Myanmar won’t bend to UN pressure over ethnic Rohingya citizenship” *Associated Press* (21 November 2013), online: The Washington Post <http://www.washingtonpost.com/world/asia_pacific/government-says-myanmar-wont-bend-to-un-pressure-over-ethnic-rohingya-citizenship/2013/11/21/af20821e-52ad-11e3-9ee6-2580086d8254_story.html>.

are parties to the CRS and CRSSP respectively, even though both documents do not essentially challenge states' power to regulate nationality or impose specific duty on the states to grant stateless persons citizenship.¹¹⁸ A further indication of some states' practice suggesting absence of recognition is deducible from the reservations made to the various international instruments on right to nationality and reduction of statelessness, especially of some of the widely adopted international instruments, such as the ICCPR, CRC, and CEDAW, discussed above.

Another relevant indication of states' practice relates to the domestication or replication of virtually all the other human rights enumerated in the UDHR in the Constitutions or Bills of Rights of various countries, except the right to nationality, just as French Cassin observed, more than six decades ago.¹¹⁹

Furthermore, and perhaps most importantly, the Hague Convention, which affirms states sovereignty on nationality matters, is still a valid statement of international law today. Thus, international law presently seems to recognize the concept of nationality as a 'privilege' (as *per* the Hague Convention) and nationality as a 'human right' (as *per* Article 15 of the UDHR) simultaneously. A review of some international and regional judicial decisions indicates that courts generally oscillate between outrightly affirming the exclusive states sovereignty in respect of nationality on the one hand, and recognizing the dual conception of nationality, that is, both as a human right and a privilege, on the other. For example, the ICJ in *Nottebohm* affirms that every sovereign State has the right to "settle by its own legislation the rules relating to the acquisition of its nationality".¹²⁰ The European Court of Justice in *Rottmann* also held that "according to established case-law, it is for each Member State... to lay down the conditions for the acquisition and loss of nationality".¹²¹ By contrast, the Inter-American Court of Human Right (IACHR) held in a 1984 *Advisory Opinion* (Costa Rica)¹²² that:

¹¹⁸ See notes 77 – 80 and the accompanying text above.

¹¹⁹ See UNECOSOC, *Commission on Human Rights Drafting Committee: International Bill of Right* E/CN.4/AC.1/3/Add.1 (11 June 1947), 273 [Unrestricted].

¹²⁰ *Nottebohm Case (Liechtenstein v. Guatemala)*, *Second Phase* (1955) I.C.J. Reports 4, at 20.

¹²¹ *Rottmann v Freistaat Bayern*, *supra*, note 108, para. 39.

¹²² *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, *Advisory Opinion* OC-4/84, IACHR Series A no 4; IHRL 3442 (IACHR 1984).

[N]ationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights. The classic doctrinal position, which viewed nationality as an attribute granted by the state to its subjects, has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the state as well as human rights issues.¹²³

About two decades later (2005), the IACHR in *Girls Yean and Bosico v Dominican Republic*¹²⁴ also held that nationality is a “non-derogable” “fundamental human right enshrined in the American Convention, and other international instruments”.¹²⁵ However, the court also held that the determination of who has a right to be a national “continues to fall within a State’s domestic jurisdiction”.¹²⁶

Like the international and regional courts/tribunal, some decisions of local courts also tend to affirm state sovereignty in respect of nationality at the expense of a human right conception of nationality. For example, in *Servicio Jesuita a Refugiados y Migrantes*¹²⁷ the Dominican Supreme Court had to consider whether an act of Congress denying Dominican nationality to the children of non-resident aliens was contrary to the Constitution and international law. The petitioners had asked the court to strike down several articles of the Migration Act¹²⁸ which

¹²³ *Ibid*, at paras. 32 – 33.

¹²⁴ *Case of the Girls Yean and Bosico v Dominican Republic*, Preliminary objections, merits, reparations and costs; IACHR Series C no 130; IHRL 1514 (IACHR 2005).

¹²⁵ *Ibid*, at para. 136.

¹²⁶ *Ibid*, para. 140. See also *Case of Ivcher Bronstein v Peru*, Merits, reparations and costs, IACHR Series C no 74; IHRL 1457 (IACHR 2001), para. 88: “Although it has traditionally been accepted that the determination and regulation of nationality are the competence of each State, as this Court has stated, the evolution in this matter shows that international law imposes certain limits on a State’s discretionality and that, in the regulation of nationality, it is not only the competence of States, but also the requirements of the integral protection of human rights that intervene”.

¹²⁷ *Servicio Jesuita a Refugiados y Migrantes and ors v Dominican Republic*, Direct Constitutional Complaint Procedure, BJ 1141.77; ILDC 1075 (DO 2005).

¹²⁸ Ley General de Migración, No 285-04, 27 August 2004 (Dominican Republic).

deprived children born in the country to non-residents of Dominican nationality, on the grounds that the provisions were contrary to Article 11(1) of the Constitution – which considered every person born within the territory of the Republic as Dominican nationals, based on principle of *jus soli*. The petitioners’ main contention was that the Migration Act was intended to restrict, limit, and exclude children born to the minority Haitian men and women resident in the Dominican Republic from Dominican nationality. In dismissing the case, the court held that every state was free to set the conditions under which individuals could become its nationals in international law and that this was supported in Article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws.¹²⁹ It also held that the Congress had not violated any principle relating to nationality against the children of nonresident aliens by denying them Dominican nationality. However, the court observes that the Dominican Republic is obliged to grant nationality to stateless individuals born in its territory, pursuant to the Convention on the Reduction of Statelessness, but that such obligation did not apply for children of Haitian origin, since they were Haitian nationals under the Haitian Constitution. Thus, Haitian children would not be rendered stateless by virtue of the Migration Act 2004.¹³⁰ Similarly, the German Federal Constitutional Court has also affirmed the sovereign power of the state to deprive a person of his naturalized citizenship obtained by fraud even when such deprivation would lead to statelessness.¹³¹

The effect of the internationally recognized dual conception of nationality is that the ‘right to a nationality’ occupies a unique position in international law. Unlike other human rights, international law presently bestows a ‘right to nationality’ on ‘everyone’ on one hand, but snatches the right away with the other hand by its recognition of exclusive states’ sovereignty on nationality matters. The dual conception of nationality, in any case, does not indicate any general practice of states recognizing the provision that “everyone has a right to nationality” as a legally binding obligation, so as to justify a conclusion that it forms part of customary international law.

¹²⁹ *Ibid*, paras. 32 – 36.

¹³⁰ *Ibid*, para. 38.

¹³¹ See *O, Final judgment on individual constitutional complaint*, 2 BvR 669/04; BVerfGE 116, 34; ILDC 441 (DE 2006).

In the above premises, while it is arguable that some elements of the right to nationality, namely prohibition against arbitrary deprivation of nationality and the right to change nationality, have attained the status of customary international law, the most important element (right to [acquire] a nationality) does not enjoy such status owing the overriding impact of states sovereignty.

4.0 RESULTANT STATELESSNESS

As shown above, the vagueness and imprecision of provisions relating to the right to nationality, as well as international law's recognition of the dual conception of nationality, essentially result in a situation where states still have somewhat unbridled power to determine who is entitled to be their national. Although states apparently no longer enact legislation that explicitly denationalize people on racial, religious or ideological grounds as was the common case pre-UDHR,¹³² the experience of the Rohingyas, Bidoons and 'Non-citizens' suggests that states still denationalize people or ethnic groups (especially those considered disloyal for whatever reason), by sometimes subtle means. One way of doing so is to simply enact legislation that essentially excludes the targeted groups as nationals of the relevant state. This is what Blitz and Lynch referred to as the "process of exclusion".¹³³

In other words, unlike the 1916 Portuguese decree, which for example, targeted all citizens born of a German father, or the 1935 Nazi Reich Citizenship Law which specifically targeted the Jews and Roma, some states – especially newly independent ones – usually denationalize targeted groups by enacting nationality legislation that simply identify a portion of the population in their territories as 'citizens', thereby excluding others. For example, as noted in chapter one, section 3 of the 1982 Burma Citizenship Law, as well as government policy, excludes the Rohingyas as citizens of Burma. Kuwaiti law places obstacles on the Nomadic Bidoon while Latvia uses language and previous employment with the former Soviet Union to exclude the Russian-speaking 'Non-citizens'.

¹³² See notes 25 – 36 and the accompanying text above.

¹³³ Brad K. Blitz & Maureen Lynch, *Statelessness and the Benefits of Citizenship: A Comparative Study* (Oxford Brookes University, 2009), 9.

The subtle nature of denationalization by the “process of exclusion” makes it look like the exercise of a specie of the right of a people to self-determination; in this case, the right of a people to determine who they are and who should be a part of them. This invokes a jealously-guarded right of all states which no state is willing to put at risk by interfering in the nationality issues of other states. Hence, for example, the Feili Kurds were deprived of Iraqi nationality under Saddam Hussein who claimed they were Iranians, and were expelled to Iran without any international interference.¹³⁴ The Black Mauritians were also deprived of their nationality by the majority Arab-led government and expelled to neighbouring countries without any interference.¹³⁵

Another aspect of the above-mentioned subtle denationalization is that the use of validly enacted legislation, such as the Burma’s 1982 Citizenship Law, gives a semblance of legitimacy to the denationalization. In other words, such legislation will not, on the face of it, be considered be in violation of the prohibition against arbitrary deprivation of nationality.

5.0 CONCLUSION

The above discussion on the interplay between state sovereignty and each of the three elements of the right to nationality shows that, in spite of the vagueness and imprecision that characterize the right to nationality provisions, the concept of a right to nationality has tremendously impacted the development of the modern nationality laws of various states, especially in relation to the prohibition of arbitrary deprivation of an individual’s nationality, and the preservation of an individual’s right to change his/her nationality.

Although some authors have suggested that the states’ representatives at the UDHR drafting stage were quite confused as to the existence of a right to a nationality or its content, the

¹³⁴ See generally Vanly, I.S., “The Forgotten Feili Kurds of Iraq” in Ahmed, M. & Gunter, M., eds., *Kurdish Exodus: From Internal Displacement to Diaspora* (Sharon, Mass: Ahmed Foundation for Kurdish Studies, 2002).

¹³⁵ Mark Manly & Laura van Waas, “The Value of the Human Security Framework in addressing Statelessness” in Alice Edwards & Carla Ferstman, eds., *Human Security and Non-Citizens: Law, Policy and National Affairs* (Cambridge: Cambridge University Press, 2010) 49, at 52.

representatives nonetheless understood the draft Article 15 of the UDHR to constitute a statement of a general principle which was not supposed to contain any provision for implementation.¹³⁶ Notwithstanding the representatives' intentions, there is no doubt that, with the plurality of international instruments declaring a right to nationality and/or imposing obligation on states to reduced statelessness, Article 15 of the UDHR has also gone beyond the hopes and expectations of many of its drafters.¹³⁷

However, the confusion that characterized the right to nationality, starting at the drafting stage, is still present unto this day. Hence the concept of nationality in international law oscillates between being a 'privilege' doled out and withdraw-able within the whims and caprices of States, to a 'human right' everyone is entitled to under international law. As a result of this confusion, most literature adopt a cautious approach in their interpretation of the right to nationality. For example, Chan, after an extensive review of virtually all relevant international instruments, merely noted a "clear *trend* in international law towards a *gradual recognition* of an individual's right to nationality."¹³⁸ In *Van Vlymen*, Justice Russell of the Federal Court (Canada), describes nationality as a "fledgling human right".¹³⁹ Forlati also noted that the "tension between the states' discretion and acknowledgment of a fully fledged human right to nationality that emerge *clearly* as regard the acquisition of nationality" and the "doubt" it gave rise to.¹⁴⁰ The French writer, Decaux, summed up the situation of the right to nationality thus:

Le droit a la nationalité a un sujet et un objet, mais non un débiteur.¹⁴¹

¹³⁶ Ziemele & Schram, *supra*, note 37, at 301 – 302: "it is quite obvious that when the UDHR was adopted, the understanding of the right as well as its implications differed among states. These differences were subsequently one cause of the rather slow development of any international practice on this issue, as well as the fact that the right to nationality was omitted from the International Covenant on Civil and Political Rights [ICCPR]." See also Adjami & Harrington, *supra*, note 47, at 95.

¹³⁷ See page 42 above.

¹³⁸ Chan, *supra*, note 2, at 13 [emphasis provided].

¹³⁹ *Van Vlymen v. Canada (Solicitor General)* (F.C.) [2005] 1 F.C.R. 617.

¹⁴⁰ Forlati, *supra*, note 53, at 20 [emphasis provided].

¹⁴¹ Literally translated as "the right to nationality has a subject, an object, but no debtor" (translated by author). See Emmanuel Decaux, "Le droit a une nationalite, en tant que droit de l'homme" (2011) 86 *Revue Trimestrielle des Drois de l'Homme* 237 at 242 – cited in Forlati, *supra*, note 53, at 20.

Unlike most other internationally recognized human rights whose origins are traceable to the progressive historical Western documents on human rights, the right to nationality was borne out of the necessities of WWII. Again, the right to nationality fundamentally challenges the sovereign rights of states, resulting in a situation where no state wants to risk its own sovereignty by interfering in the nationality issues of another. As the Swahili saying goes “where two elephants fight, the grass suffers”. Like the suffering grass, it is the stateless people like the Rohingyas, Bidoons and others who suffer the consequence of the conflict between the right to nationality and state sovereignty.

CHAPTER FOUR

TAKING RIGHT TO NATIONALITY SERIOUSLY: AN *ERGA OMNES* OBLIGATION?

*Not only did the loss of national rights in all instances entail the loss of human rights; the restoration of human rights...has been established so far only through the restoration or establishment of national rights. The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships- except that they were still human. The world found nothing sacred in the abstract nakedness of being human.*¹

As discussed in previous chapters, two main objectives for the emergence of nationality as a human right were to: (a) remedy the situation of the millions of stateless people who were refugees in various parts of Europe after the Second World War, and (b) prevent future statelessness.² However, the continued existence of stateless groups like the Rohingyas and the Bidoons suggests that the intended use of the concept of a right to nationality to prevent future statelessness has not been achieved. This is due to the overbearing influence of states' sovereignty on the general perception of the right to nationality.

As also already observed, a fundamental rule of international law is that states are generally required to consent to the provisions of a treaty in order for the state to be bound by the treaty. A corollary of this rule is that where a state is not a party to a relevant international instrument, it will not be bound by its provisions.³ Burma has not ratified most of the relevant international

¹ Hannah Arendt, *The Origins of Totalitarianism* (Cleveland: The World, 1958), 299 [Arendt] (emphasis supplied).

² See pages 36 – 40, 64 – 67 above.

³ See generally Rafael Nieto-Navia, "International Peremptory Norms (Jus Cogens) and International Humanitarian Law" in Vohrah Lal Chand *et al*, eds., *Man's Inhumanity to Man, Essays in Honour of Antonio Cassese* (The Hague: Kluwer Law International, 2003), 595 [Nieto-Navia]; Gerbard von Glabn and James Larry Taulbee, *Law Among Nations: An Introduction to Public International Law*, 8th ed (New York: Pearson Education, 2007) [von Glabn & Larry]; Ian Brownlie, *Principles of Public International Law*, 6th ed, (Oxford: Oxford University Press, 2003), 1-25; Malcom N. Shaw, *International Law*, 6th ed, (Cambridge: Cambridge University Press, 2008) [Shaw], 1-30; Rebecca M.M. Wallace, *International Law*, 5th ed, (London: Sweet & Maxwell, 2005) [Wallace]; Mark Freeman & Gibran Van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) [Freeman & van Ert].

instruments relating to the right to nationality, while Kuwait made reservations to the relevant provisions in the few instruments it ratified.⁴ The effect of the aforementioned rule on states' consent is that Burma and Kuwait are not obliged to observe the right to nationality of the Rohingyas and Bidoons respectively. Thus, the effective denationalization of the Rohingyas and the Biddons by virtue of their respective citizenship law is, based on the requirement of state consent, not in violation of international human rights law. However, one of the exceptions to the requirement of state consent is the concept of *erga omnes* obligation.

The purpose of this chapter is to make a case that the right to nationality should be taken seriously and the duty to protect the right should be protected as an *erga omnes* obligation. This involves an examination of the relationship between possession of nationality and the enjoyment of other rights, as well as the relationship between denationalization/statelessness and the duty to prevent acts of genocide – using the Rohingyas and other stateless people as a case study.

1.0 THE CONCEPT OF *ERGA OMNES* OBLIGATIONS

The Latin expression *erga omnes* is used to describe an obligation owed to all mankind and which all states have an interest in its enforcement.⁵ The term is used in contradistinction with the obligations of a state arising from, for example, bilateral treaties. The concept received judicial impetus in the dictum of the International Court of Justice (ICJ) *Barcelona Traction case*⁶ where the court stated that:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In

⁴ See pages 51 – 52 above.

⁵ See Olivia Lopes Pegna, “Counter-claims and Obligations *Erga Omnes* before the International Court of Justice” (1998) 9 *European Journal of International Law* 724, 731 – 733; Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Clarendon Press, 2000) 1 – 17 [Ragazzi]; Karl Zemanek, “New Trends in the Enforcement of *erga omnes* Obligations” in J.A. Frowein & R. Wolfrum, eds., *Max Planck Yearbook of United Nations Law* (Netherlands: Kluwer Law International, 2000), 1 – 17 [Zemanek]; Christian J. Tams, , *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005).

⁶ *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, I.C.J. Reports 1970, 32.

view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.⁷

The above dictum identifies two features of *erga omnes* obligations, (a) universality, in the sense that *erga omnes* obligations are binding on all states without exception, and (b) solidarity, in the sense that every State is deemed to have a legal interest in their protection.⁸ In order to further clarify the position of *erga omnes* obligations in international law, it is useful to examine the similarities and difference between *erga omnes* obligations and *jus cogens* norms.

1.1 Erga Omnes and Jus Cogens

Also related to the concept of *erga omnes* obligations in international law is the concept of *jus cogens* (“the compelling law”). *Jus cogens* are “non-derogable rules of international ‘public policy’”,⁹ which according to Bassiouni, occupy “the highest hierarchical position among all other norms and principles” in international law.¹⁰ Article 53 of the Vienna Convention is generally regarded as a codification of the status of *jus cogens* under international law. It states that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law (*jus cogens*).¹¹ In order for a norm to qualify as *jus cogens* under Article

⁷ *Ibid*, paras. 33 – 34.

⁸ Ragazzi, *supra*, note 5, at 17.

⁹ Michael Byers, “Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules” (1997) 66 *Nordic Journal of International Law* 211 [Byers].

¹⁰ M. Cherif Bassiouni, “Law International Crimes: ‘Jus Cogens’ and ‘Obligatio Erga Omnes’” (1996) 59 *Law and Contemporary Problems* 63, at 67.

¹¹ For a general discussion on the status of *jus cogens* in international law, see Zemanek, *supra*, note 5, 6 – 13; Ragazzi, *supra*, note 5, 43 – 73; Genc Trnavci, ‘The Meaning and Scope of the Law of Nations in the Context of The Alien Tort Claims Act And International Law’, (2005) 26 *University of Pennsylvania Journal of International Economic Law* 193 at 250 – 255; Alfred P. Rubin, “Actio Popularis, Jus Cogens and Offenses Erga Omnes?” (2001) 35 *New England Law Review* 265, 271 – 280; Sandesh Sivakumaran, “Impact on the Structure of International Obligations” in Menno T. Kamminga & Martin Scheinin, eds., *The Impact of Human Rights Law on General International Law* (Oxford: Oxford University Press, 2009) 134; Gerald J. Postema, “Custom in International Law: A Normative Practice Account” in A. Perreau-Saussine and J. Murphy, eds., *The Nature of Customary Law: Philosophical, Historical and Legal Perspectives* (Cambridge: Cambridge University Press, 2007) 279; Harry Gould, “Categorical obligation in

53 of the Vienna Convention, the norm must be: (a) “of general international law”, as opposed to *regional* international law,¹² (b) “accepted and recognized” by the international community of States as a whole – this however does not mean that there must be a unanimous agreement by all states,¹³ (c) one of which “no derogation is permitted”, and which “can be modified only by a subsequent norm of general international law having the same character.”¹⁴

Some authors have identified some similarities between the concepts of *erga omnes* obligations and *jus cogens*. For example, Ragazzi observes that they are both “meant to protect the common interests of States and basic moral values.”¹⁵ However there is some confusion on the exact nature of the relationship between the two concepts.¹⁶ While some scholars have asserted that there are important differences between the two concepts,¹⁷ others have argued that the two concepts refer to different aspects of the same rules, and are therefore coterminous.¹⁸ For example, according to Picone, “[t]he category of rules which impose obligations *erga omnes* has been kept distinct from the category of rules of *jus cogens* from the very beginning”.¹⁹ He argues

international law” (2011) 3:2 International Theory 254; Simeon P. Sungi, “*Obligatio Erga Omnes* of Rape as a *Ius Cogens* Norms: Examining the Jurisprudence of International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and the International Criminal Court” (2007) 9 European Journal of Law Reform 113.

¹² Nieto-Navia, *supra*, note 3, at 605.

¹³ *Ibid*, 605 – 607; see also Ragazzi, *supra*, note 5, at 51 – 57.

¹⁴ *Ibid*, at 608.

¹⁵ Ragazzi, *supra*, note 5, at 72.

¹⁶ Byers, *supra*, note 9, at 211. See also Stefan Kadelbach, “Jus Cogens, Obligations Erga Omnes and Other Rules – the Identification of Fundamental Norms” in Christian Tomuschat & Jean-Marc Thouvenin, eds., *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Martinus Nijhoff, 2006), 21-40; Christian Tomuschat, “Reconceptualizing the Debate on Jus Cogens and Obligations Erga Omnes – Concluding Observations” in Christian Tomuschat & Jean-Marc Thouvenin, eds., *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, *supra*, 425-436.

¹⁷ See for example, Paolo Picone, “The Distinction between Jus Cogens and Obligations Erga Omnes” in Enzo Cannizzaro, ed., *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press, 2011) 412 [Picone].

¹⁸ See Byers, *supra*, note 9, at 211.

¹⁹ Picone, *supra*, note 17, at 415 – 416; the author alludes to the fact that the ICJ did not make any reference to Article 53 of the Vienna Convention in defining the concept of *erga omnes* as evidence that “the Court distinguishes them clearly from all other general international rules, including the peremptory ones, which are only ‘produced’ by the international community as a whole. He also points to failure of the ICJ to “clarify whether the rules which impose obligations

that there is no justification to postulate that the norms which impose obligations *erga omnes* are generally non-derogable.²⁰ Similarly, Byers uses the mode of creation and the effect of the two rules to make distinction between *jus cogens* and *erga omnes*. According to him, *jus cogens* rules “are derived from the ‘process of customary international law’, which is itself part of an international constitutional order” while *erga omnes* rules may “be created either through the process of customary international law or by treaty”.²¹ He concludes that while “*jus cogens* rules are necessarily *erga omnes* rules”, “*erga omnes* rules could exist which were not of a *jus cogens* character”²² and that “[u]nlike *jus cogens* rules, *erga omnes* rules operate to expand the scope of possible claimants in those situations where traditional rules of standing do not suffice to ensure that all rules of international law are capable of supporting effective inter-State claims.”²³ Like Byers, Nieto-Navia, has also argued that “although all norms of *jus cogens* are enforceable *erga omnes* not all *erga omnes* obligations are *jus cogens*.”²⁴ To Zemanek, “all peremptory norms create obligations *erga omnes*, but not all *erga omnes* obligations derive from peremptory norms.”²⁵

Notwithstanding the confusion on the exact nature of the relationship between *jus cogens* and *erga omnes*, existing literature tend to agree on duty to observance of human rights as a point of convergence between the two concepts.²⁶ However, not all norms of human rights can be included as *jus cogens*.²⁷

erga omnes are peremptory or not”, as evidence that the Court “therefore does not intend to impose limits on the will of states: rather, it recognizes that they have functional powers... to be managed on behalf of the international community as a whole”.

²⁰ *Ibid*, at 418.

²¹ Byers, *supra*, note 7, at 212.

²² *Ibid*.

²³ *Ibid*, at 212 – 213.

²⁴ Nieto-Navia, *supra*, note 3, at 609.

²⁵ Zemanek, *supra*, note 5, at 6.

²⁶ See for example, Nieto-Navia, *supra*, note 3, at 607; Theodor Meron, “On a Hierarchy of International Human Rights” (1988) 80:1 American Journal of International Law 1, at 14 [Meron]; Erika De Wet & Jure Vidmar, eds., *Hierarchy in International Law: The Place of Human Rights* (Oxford: Oxford University Press, 2012), 3 – 9; Jure Vidmar, “Norm Conflicts and Hierarchy in International Law: Towards a Verticla International Legal System?” in Erika De Wet & Jure Vidmar, eds, *Hierarchy in International Law: The Place of Human Rights supra*, 13, at 13 – 16; Andrea Bianchi, “Human Rights and the Magic of Jus Cogens” (2008) 19:3 EJIL 491 – 508; Robert Howse & Makau Mutua, *Protecting Human Rights in a Global Economy*:

1.2 The Protection of Human Rights as *Erga Omnes* Obligation

Scholars generally identify sources of international human rights law along the lines of the sources of international law itself set out in Article 38 of the Statute of the International Court of Justice (ICJ). These are (a) international conventions, (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilised nations; (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.²⁸ However, the *erga omnes* rule in the *Barcelona Traction case* suggests that an obligation to protect *basic* human rights in international law may arise outside treaties and customary international law. Of particular importance to this thesis are: (a) the recognition of the rules concerning *basic* human rights, and (b) the rule outlawing genocide.

There has been much debate on what constitutes the “basic rights” of the human person and the extent to which the ICJ intended to distinguish between basic rights and other rights.²⁹ For example, according to Meron, it is unclear whether the “basic rights” “are synonymous with human rights *tout court* or are limited to rights intimately associated with the human person and human dignity and generally accepted, such as the protection from slavery and racial

Challenges for the World Trade Organization (International Centre for Human Rights and Democratic Development, Canada, 2000) ; Anthony D’Amato, “It’s a Bird, It’s a Plane, It’s Jus Cogens” (1990) 6 Connecticut Journal of International Law 1; Karen Parker & Lyn Beth Neylon, “Jus Cogens: Compelling the Law of Human Rights” (1988-89) 12 Hastings International and Comparative Law Review 411; Oliver De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge: Cambridge University Press, 2010).

²⁷ See for example, Neito-Navia, *supra*, note 3, 607, n. 98.

²⁸ See generally, Brownlie, *supra*, note 3, at 3 – 25; Wallace, *supra*, note 3, at 7 – 35; Shaw, *supra*, note 3, at 67 – 128; von Glahn & Larry, *supra*, note 3, at 50.

²⁹ See for example, Meron, *supra*, note 26, at 10 – 11; Ragazzi, *supra*, note 5, at 140 – 145; Sandesh Sivakumaran, “Impact on the Structure of International Obligations” in Menno T. Kamminga and Martin Scheinin, eds., *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009) 134 at 138; Margot E. Salomon, *Global Responsibility for Human Rights; World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007), 170 -174; Henry Shue, “Basic Rights” in Rhonda L. Callaway & Julie Harrelson-Stephens, eds., *Exploring International Human Rights; Essential Readings* (Colorado: Lynne Rienner, 2007) 16 – 20 [Shue]; John O’Manique, “Human Rights and Development” (1992) 14:1 Human Rights Quarterly 78, at 84 – 85 [O’Manique].

discrimination”.³⁰ He argues that “[i]f the Court intended to set apart the basic rights of the human person, the inclusion of some human rights among them would perhaps depend on their acceptance into the corpus of general international law or on their incorporation into instruments of a universal or quasi-universal character; but a more subjective and difficult characterization would also have to be made, such as the nature of their association with the human person and human dignity.”³¹ Ragazzi also observed that some literature used the term “basic rights” interchangeably with “fundamental rights” and “human rights”.³² He however opines that the ICJ, in confining its dictum to *the basic rights of the human person*, “seemed to convey the clear message that the character *erga omnes* does not apply indiscriminately to all principles and rules protecting human rights.”³³ He examines the Restatement on foreign relations law adopted by the American Law Institute which, in listing the human rights that are protected by international customs and entail the responsibility of a law-breaker to all other States (*erga omnes*), mentions only a few other obligations than those listed by the ICJ. The additional obligations are ‘the murder or causing the disappearance of individuals’, ‘torture or other cruel, inhuman, or degrading treatment or punishment’, ‘prolonged arbitrary detention’, and ‘a consistent pattern of gross violations of internationally recognized human rights’.³⁴ According to him, this shows “that the Restatement, almost twenty years after the International Court’s dictum, took the same cautious approach and restricted the character *erga omnes* to only a few obligations in the area of human rights”.³⁵ He however also observes that the Institute of International Law adopted a different approach when it adopted a resolution on human rights and non-intervention at its session in Santiago de Compostela in 1989. Article 1 of the Resolution reads thus:

Human rights are a direct expression of the dignity of the human person. The obligation of States to ensure their observance derives from the recognition of this dignity as proclaimed in the Charter of the United Nations and in the Universal Declaration of Human Rights. This international obligation, as expressed by the International Court of Justice, is *erga omnes*; it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human

³⁰ Meron, *supra*, note 26, at 10.

³¹ *Ibid.*

³² Ragazzi, *supra*, note 5, at 140.

³³ *Ibid* at 141.

³⁴ *Ibid*, 141 – 142. Citing Third Restatement, Section 702.

³⁵ *Ibid.*

rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world.³⁶

The above resolution tends to suggest that “the very obligation of States to ensure the protection of human rights is an obligation *erga omnes*” and it applies to every right recognized in the Universal Declaration of Human Rights.³⁷ The suggestion finds support in the works of some authors who have rejected any distinction between “basic rights” and *other* human rights,³⁸ and the Vienna Declaration which states that all human rights are *universal, indivisible, interdependent and interrelated*.³⁹ Some authors have, however, rejected the notion of the indivisibility of human rights and instead argue that human rights are in hierarchical order.⁴⁰ Just like *jus cogens*, it is doubtful if all human rights can be said to impose obligation *erga omnes* on states.⁴¹

Leaving aside the debate as to whether all human rights may be said to be “fundamental” or “basic”, it is arguable that, by restricting its reference to *basic* human rights and listing a few specific examples in the *Barcelona Traction case*, the ICJ implicitly rejected the idea that the

³⁶ *Ibid*, at 142.

³⁷ *Ibid*, at 143 – 144.

³⁸ See for example, Meron, *supra*, note 26, at 13 (“international practice and scholarly opinion seem to have moved well beyond the *erga omnes* dictum of *Barcelona Traction*: perhaps the distinction between basic human rights and human rights *tout court*, as regards their *erga omnes* character, can no longer be supported.”). See also Yoram Dinstein, “The Erga Omnes Applicability of Human Rights” (1992) 30 *Archiv des Völkerrechts* 16; John P. Humphrey, “The Universal Declaration of Human Rights: Its History, Impact and Judicial Character” in BC Ramcharan *Human Rights: Thirty Years After the Universal Declaration* (Martinus Nijhoff, 1979), 21-37; Magdalena Sepúlveda, *et al*, *Human Rights Reference Handbook*, (Cuidad Colon: University for Peace, 2004) 7 – 13; Frans Viljoen, *International Human Rights Law in Africa*, 2d ed, (Oxford: Oxford University Press, 2012) 5 – 6; Anthony J. Langlois, “Normative and Theoretical Foundations of Human Rights”, in M. Goodhart, ed, *Human Rights: Politics and Practice* (Oxford: Oxford University Press, 2009) 11 – 25.

³⁹ UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, Part 1, paragraph 5 [Endorsed by General Assembly Resolution 48/121, 20 December 1993].

⁴⁰ See for example, Teraya Koji, “Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights” (2001) 12:5 *EJIL* 917, at 924 – 927; Freeman & van Ert, *supra*, note 2, at 35 – 36.

⁴¹ See Ragazzi, *supra*, note 5, at 145; Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law* (New York: NYU School of Law, 2004) 6.

duty to protect *all* human rights constitutes obligations *erga omnes*. It, therefore, seems that the rights contemplated by the ICJ to constitute *basic* human rights are such that, as Ragazzi has suggested, would coincide with non-derogable rights in a public emergency.⁴² The rights would also be such that, according to Shue, the “enjoyment of them is essential to the enjoyment of all other rights”.⁴³ O’Manique also describes such rights as those that are required for “good human development”.⁴⁴

Adopting Shue’s and O’Manique positions on what constitutes *basic* human rights, this chapter will examine whether the protection of the right to nationality qualifies as an *erga omnes* obligation. This will be done by: (a) examining the relationship between the right to nationality and the enjoyment of other rights for the purpose of contending that the right to nationality qualifies a *basic* right, and (b) examining the relationship between denationalization/statelessness and the *erga omnes* duty to prevent genocide, for the purpose of determining to the extent to which the practice of denationalizing certain ethnic groups qualifies as an early warning or step towards genocide.

2.0 RIGHT TO NATIONALITY AS “BASIC RIGHT”

Hannah Arendt was one of the millions of Jews who were stripped of their German citizenship by Nazi Germany in 1933. She became a naturalized US citizen in 1951.⁴⁵ Her work, *The Origins of Totalitarianism* is a detailed reflection of her experience as a stateless person in pre-UDHR Europe. She compares the travails of stateless people with the prevailing arguments, inspired by the American Bill of Rights (1789) and the French Declaration of the Rights of Man (1789), that the rights of man are “inalienable”,⁴⁶ “irreducible and undeducible from other rights

⁴² Ragazzi, *supra*, note 5, at 144.

⁴³ Shue, *supra*, note 29, at 16.

⁴⁴ O’Manique, *supra*, note 29, at 171.

⁴⁵ See generally, Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford: Oxford University, 2012), 2 – 6 [Kesby]; John McGowan, *Hannah Arendt: An Introduction* (University of Minnesota, 1998); Kelly Staples, *Retheorising Statelessness: A Background Theory of Membership in World Politics* (Edinburgh: Edinburgh University Press, 2012) 1 – 16 [Staples].

⁴⁶ Arendt, *supra*, note 1, at 290 – 291.

or law”,⁴⁷ “independent of all governments”,⁴⁸ “spring immediately from the ‘nature’ of man”,⁴⁹ “self-evident truths”,⁵⁰ etc., and she concludes that “the world found nothing sacred in the abstract nakedness of being human”.⁵¹ According to her, the stateless person is an “anomaly” for whom the law has not made any provision, an “outlaw” who is “completely at the mercy of the police, which itself did not worry too much about committing a few illegal acts in order to diminish the country's burden of *indesirables*.”⁵² The “internment camp” was the only “country” the world could offer the stateless.⁵³

She identifies some of the losses suffered by the stateless, who she describes as “rightless”. According to her, the first loss was “the loss of their homes, and this meant the loss of the entire social texture into which they were born and in which they established for themselves a distinct place in the world.”⁵⁴ This represents not just the loss of a home “but the impossibility of finding a new one” in the sense of there being “no place on earth where [they] could go without the severest restrictions, no country where they would be assimilated, no territory where they could found a new community of their own”.⁵⁵ The second loss was “the loss of government protection, and this did not imply just the loss of legal status in their own, but in all countries”.⁵⁶ According to her, the calamity of the stateless people is:

[N]ot that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion—formulas which were designed to solve problems within given communities—but that they no longer belong to any community

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, 291.

⁴⁹ *Ibid.*, 297.

⁵⁰ *Ibid.*, 298.

⁵¹ *Ibid.*, 299.

⁵² *Ibid.*, 283.

⁵³ *Ibid.*, 284. See also Kesby, *supra*, note 45, at 2 – 3; Eva Erman, “The ‘Right to Have Rights’ to the Rescue: From Human Rights to Global Democracy” in Mark Goodale, ed, *Human Rights at the Crossroads* (Oxford: Oxford University Press, 2013), 72 at 74 – 75; Natalie Oman, “Hannah Arendt's ‘Right to Have Rights’: A Philosophical Context for Human Security” (2010) 9 *Journal of Human Rights* 279 – 302; Christine Biancheria, “Restoring the Right to Have Rights: Statelessness and Alienage Jurisdiction in Light of *Abu-Zeineh v. Federal Laboratories, Inc.*” (1996) 11 *Am. U. J. Int’l L. & Pol’y* 195.

⁵⁴ Arendt, *supra*, note 1, at 293.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, 294.

whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them.⁵⁷

It is tempting to argue that today's world is markedly different from pre-UDHR Europe, which had influenced Arendt's perception of the stateless people, with the adoption of the various international human rights instruments. For example, the UDHR declares that all human beings are born free and equal in dignity and rights,⁵⁸ and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.⁵⁹ Article 2 of the International Covenant on Civil and Political Rights (ICCPR) also obliges each State Party to the Covenant to respect and to ensure to all individuals within its territory and subject to its jurisdiction enjoy all the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. According to the United Nations Human Rights Committee, "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness".⁶⁰ Similarly, the UN Committee on the Right of the Child has also stated that "the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness".⁶¹

⁵⁷ *Ibid*, 295-296.

⁵⁸ Article 1, UDHR.

⁵⁹ *Ibid*, Article 2.

⁶⁰ UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, available at: <http://www.refworld.org/docid/45139acfc.html> [accessed 21 May 2013].

⁶¹ UN Committee on the Rights of the Child, General Comment No. 6: "Treatment of Unaccompanied and Separated Children outside their Country of Origin," CRC/GC/2005/6, 1 September 2005.

The existence of various international human rights instruments which purport to apply to ‘everyone’ has resulted in arguments regarding human rights based on ‘humanity’. For example, van Waas observes a “trend towards the denationalization” of human rights⁶² and concedes a “possible denationalization of rights”.⁶³ Donnelly also declares that “[h]uman rights are, literally, the rights that one has simply because one is a human being.”⁶⁴

Against the backdrop of the above contrasting positions, the purpose of this chapter is to show that despite the *everyone-ness* claim of the various international human rights provisions, most of the rights couched as belonging to ‘everyone’ are, as van Waas beautifully puts it, “*citizens rights dressed up as human rights*”.⁶⁵ This will involve an examination of the possession of nationality as a precursor to the enjoyment of other international human rights for the purpose of showing that the ‘right to nationality’ is properly described as the “right to have rights”⁶⁶ and is therefore a *basic* right within the *erga omnes* rule.

2.1 Freedom of Movement

Article 13 of the UDHR provides that ‘everyone’ has the right to freedom of movement and residence within the borders of each state, and that everyone has the right to leave any country, including their own, and to return to their country. This freedom of movement under the UDHR consists of three elements: (a) freedom to move freely and reside within the states, (b) right to return to one’s country, (c) freedom to leave any country.

⁶² Laura van Waas, “Nationality and Rights” in Brad K. Blitz & Maureen Lynch, eds., *Statelessness and Citizenship: A Comparative Study on the Benefit of Nationality* (Oxford: Oxford Brookes University, 2009) 19 [van Waas].

⁶³ *Ibid*, at 20.

⁶⁴ Jack Donnelly, *Universal Human Rights in Theory & Practice*, 2ed (Cornell University Press, 2003) 10; see also D. Weissbrodt & C. Collins, “The Human Rights of Stateless Persons” (2006) 28 *Human Rights Quarterly* 245, at 248: “The principles of human rights would maintain that being human is the right to have human rights.”

⁶⁵ Van Waas, *supra*, note 62, at 21.

⁶⁶ See generally, Arendt, *supra*, note 1, at 296, *Perez v. Brownell* 356 US 44 at 64, Warren C.J dissenting; *Trop v. Dulles* 356 U.S. 86 (1958) *per* Warren C.J.; Lisa C. Stratton, “The Right to have Rights: Gender Discrimination in Nationality Laws”, (1992) 77 *Minnesota Law Review* 195.

2.1.1 Freedom to move freely and reside within the State

Only the UDHR makes this right available to *everyone*: other international and regional human rights instruments make the rights applicable to citizens or ‘everyone lawfully within the territory’ of states.⁶⁷ The use of the qualifying word ‘lawfully’ suggests the exclusion of unlawful residents. This effectively excludes the vast majority of stateless people, like the Bidoons who, as shown in chapter one, are classified as ‘illegal residents’ in Kuwait, and the Rohnigyas, who are also generally unlawful residents in the neighbouring countries where they fled to.⁶⁸ Being regarded as unlawful residents, the Rohingyas and Bidoons are unable to move freely within their respective countries. Their unlawful residence also seems to preclude them from the application of Article 26 of the Convention on the Status of Stateless Persons (CRSSP),⁶⁹ which obliges contracting states to accord stateless persons ‘lawfully in its territory’ the right to choose their residence and move freely within its territory.⁷⁰ Hence, available evidence suggests that the statelessness of stateless people like the Rohingyas usually make them victims of arbitrary arrests and detention.⁷¹ Indeed, most of them are sometimes confined to ‘internment’ or refugee camps in neighbouring countries.

⁶⁷ See Article 12(1) of the ICCPR; *American Convention on Human Rights*, Article 22(1) [*American Convention*]; *Arab Charter on Human Rights*, Article 26(1) [*Arab Charter*]; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 45 [*European Convention*], cf. Article 12(1) of the African Charter on Human and Peoples Rights [*African Charter*]: Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

⁶⁸ See pages 9, 14-16 above.

⁶⁹ (1954) U.N.T.S. Vol. 360, 117 [*1954 Convention*].

⁷⁰ It is useful to observe that in exercise of their ‘sovereignty’ Netherland, Zambia and UK (in respect of the West Indies) have made reservations and declaration which limit the applicability of the Article to stateless persons in their territory. See Status update of the 1954 Convention as at 17 May April 2013 culled from the UN website, online: United Nations Treaty Collection <http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en> [*1954 Convention Status Update*].

⁷¹ See for example UN High Commissioner for Refugees, *UNHCR Brief on Statelessness and Detention Issues*, 27 November 1997, available at: <http://www.refworld.org/docid/4410638fc.html> [accessed 11 July 2013], which observes that “there are numerous cases of persons held in indefinite detention because they have no nationality, or their nationality status is unclear. While many problems relating to statelessness have regional variations, some types of statelessness being found in one region and not another,

Even within their respective countries, the Rohingyas and the Bidoons do not enjoy any freedom to move within the country. In Burma, a 2004 Amnesty International report found that the citizens' identity card functions as an "internal passport" which enables people to freely move from place to place.⁷² However, the Rohingyas do not have this important "internal passport" by reason of their denationalization, thus they "must apply for permission" to leave their village in Northern Arakan State, even if it is just to go to another nearby village.⁷³ The report also observes that when the Rohingyas want to travel to a village in the same township they need to apply for "a local travel pass", but if they want to go further, for example to another township, they have to apply for a different kind of travel permit known as 'Form 4' at the Immigration Department at the *NaSaKa* camp.⁷⁴ They are also required to state their reasons for the travel and pay for the Form 4. This practice does not extend to other residents of Arakan State.⁷⁵

2.1.2 Right to return to one's country

One of the most significant implications of being a citizen of a country is the right to enter the country.⁷⁶ Arendt describes this as a right to a "place in the world".⁷⁷ A state's duty to admit its nationals has been described as "the essence of nationality".⁷⁸ This right to return to one's country also implies the right to 'remain' in the country and not be expelled from it. This right is also unavailable to stateless people like the Rohingyas and the Bidoons who are regarded as

the problem of detention for those without an effective nationality appears to be a global one" (para. 2).

⁷² Amnesty International, *Myanmar The Rohingya Minority: Fundamental Rights Denied* (May 2004) 14 [*Amnesty 2004*].

⁷³ *Ibid.*

⁷⁴ *Ibid.*, 15.

⁷⁵ *Ibid.* See also Irish Centre for Human Rights, "Crimes against Humanity in Western Burma: The Situation of the Rohingyas" (Galway: National University of Ireland, 2010), 10-16, online: NUI <http://www.nuigalway.ie/human_rights/documents/ichr_rohingya_report_2010.pdf> [*ICHR Report*].

⁷⁶ See generally, Kesby, *supra*, note 45, at 13 – 23.

⁷⁷ Arendt, *supra*, note 1, at 293.

⁷⁸ See Kesby, *supra*, note 45, at 16. See also H.F van Panhuys, *The Role of Nationality in International Law: An Outline* (Leiden: Sijtholf, 1959), 56; Francesca De Vittor, "Nationality and Freedom of Movement" in Alessandra Annoni & Serena Forlati, eds, *The Changing Role of Nationality in International Law* (Abingdon, Oxon: Routledge, 2013), 96 – 116.

citizens of nowhere. The dilemma of the stateless in this regard was aptly explained by van Waas thus:

[W]hile citizens enjoy the right to (re)enter and remain in their country of nationality, states remain free to “set the conditions for entry and residence of aliens [and retain] the right to expel them”. An individual may, therefore, be refused admittance to — or be expelled from — a state of which he is not a national. Where the stateless are concerned, that is, *every* state. The stateless are, once more, the victims of a hidden exclusion clause and find themselves without any automatic and unqualified right to (re)enter or remain on the soil of *any* state.⁷⁹

2.1.3 Freedom to leave ‘own’ or ‘any’ country

Like the UDHR, other international and regional human rights instruments provide that *everyone* has a right to leave any country, including his own⁸⁰ or that no one should be ‘arbitrarily or unlawfully prevented’ to leave any country.⁸¹ For stateless persons, the enjoyment of this rights “becomes a practical impossibility”⁸² for various reasons. First, they do not ‘own’ any country from which they have right of emigration. Second, and more importantly, the absence of their ‘own’ country also means that they are usually unable to obtain international passports, which in modern times is the most acceptable and valid international travel document. Regarding the right to leave ‘any’ country, the inability to obtain international passports also invariably impedes the freedom of stateless persons to leave ‘any’ country. However, Article 28 of the CRSSP provides thus:

The Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other stateless person in their territory and they shall in particular give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence.

⁷⁹ Van Waas, *supra*, note 62, at 22 (footnotes omitted).

⁸⁰ See Article 12(1) of ICCPR, Article 22(1) of American Convention, Article 12(2) of African Charter.

⁸¹ Article 27(1) of the Arab Charter.

⁸² Van Waas, *supra*, note 62, at 23.

This article seems to recognize the reality that the vast majority of stateless persons are not ‘lawfully staying’ in the territory of contracting states, hence its provision that ‘any other stateless person’ in the territory should be given ‘sympathetic consideration’. It also seeks to tackle some of the challenges facing stateless persons living unlawfully in the territory of contracting states. Unfortunately, and like other provisions relating to stateless people, some contracting states have invoked their ‘sovereignty’ to reduce the effectiveness of this provision. Austria, for example, declared that this provision shall apply only to stateless persons ‘lawfully’ in its territory.⁸³ Bulgaria declared that it shall only apply to persons the country has “granted the status of stateless person” and who also have “permanent or long-term residence permit in accordance with the national legislation of the Republic of Bulgaria.”⁸⁴ For Czech Republic, the provision is only applicable to stateless persons having “permanent residence permit”,⁸⁵ while Finland declared it will not issue such documents at all.⁸⁶

The effect of the above is that the vast majority of stateless persons around the world do not have access to valid travel documents, which results in the stateless persons virtually having no “freedom” to move from country to country. The predicament of an average stateless person is aptly described by a Human Rights Watch’s reported testimony of an ‘undocumented Rohingya man in Kuala Lumpur’:

In 1990 I was arrested and because there was no detention camp I was sent to Pudu jail. I was coming from work when the police asked for my passport. I was doing daily work-construction. The police arrested me for a passport case. I didn't see a judge or magistrate, and I didn't have a charge or a sentence. After about four months in jail, immigration took me to the Thai border. Other Rohingya, Burmese, Pakistanis, and a few Indonesians were there as well.

In 1993 I was arrested on my way home from work. I was in Pudu jail for about three months and was then sent to the Thai border.

In 1995 I was sent to the Kajang immigration camp. It was also a passport case, and I was brought to the court. In court the magistrate asked me if I was arrested two other times,

⁸³ 1954 Convention status update as at 20 August 2013, online: United Nations Treaty Collection <http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en>.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

and I said "yes." He asked when I came and if I had travel documents. I said that I had none because I am Rohingya and explained that I couldn't stay in Burma. The magistrate asked me if I was guilty of illegal entry, and I said "yes." He sentenced me to two months in Kajang prison. I did not have a lawyer. After prison I was sent to Kajang immigration camp for eight months. With eighty other Rohingya I was then deported to the Thai border.⁸⁷

2.2 Right to take part in Government and access to Civil Service⁸⁸

Article 21 of the UDHR states that *everyone* has the right to take part in the government of *their country* and also that *everyone* has the right of equal access to public service *in their country*. This political right includes the right to vote and be voted for, and also the right to work in public service. It seems the modern expression of this right has moved beyond merely queuing at polling stations or having one's name on the ballot paper as a candidate, rather, it now encompasses the right to be heard in the running of state affairs, right to hold the government accountable to its citizens for its various actions and policies. This modern expression is presently vivid in the on-going Arab Spring and the various versions of *Occupy* (Wall Street) movements. The Arab Spring and the *Occupy* (Wall Street) movements have become an avenue for people in the Middle East and the Western world to assert their socio-political rights to take part in the management of their affairs, as well as to hold the government accountable to its citizens.

Although the UDHR claims that this right is for *everyone*, other international and regional human rights instruments have restricted the application of this right to 'citizens' only.⁸⁹ According to Rudan, "political rights constitute a fundamental feature of the modern idea of citizenship. Both the right to vote and the right to hold public office can be restricted on the basis

⁸⁷ Human Rights Watch, *Living in Limbo: Burmese Rohingyas in Malaysia*, 1 July 2000, Vol. 12, No. 4, (C), available at: <http://www.unhcr.org/refworld/docid/3ae6a8743.html> [accessed 13 May 2012].

⁸⁸ Kesby discusses this relationship under the heading: "The democratic governance orientation: the right to a nationality as essential for democratic governance". See Alison Kesby, *supra*, note 45, at 57 – 60.

⁸⁹ See for example, Article 25 of ICCPR, Article 23 of American Convention, Article 24 of Arab Charter, Articles 39 and 40 of European Convention; Article 13 of African Charter.

of nationality.”⁹⁰ The limited application of this right effectively means that stateless persons, who in any event do not have any country to call their ‘own’, are excluded from the application of the right to participate in ‘the government of their country’.⁹¹ In other words, stateless people like the Rohingyas and Bidoons are unable to enjoy this right because they have no country or government. Again, with the restriction of the application this right to ‘citizens’, they are also not usually in a position to protest against the government of their respective states or wherever they find themselves as ‘lawful’ or ‘unlawful’ residents.

2.3 Employment Rights

Article 23 of the UDHR encapsulates modern employment rights under international human rights law. It provides for the “right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment”. Even though the UDHR claims the right is for ‘everyone’, some other international and regional human rights instruments make the right available only to citizens, or at least make a distinction between the citizen’s rights and that of ‘everyone’. For example, Article 15 of the European Convention provides that (a) everyone has the right to engage in work and to pursue a freely chosen or accepted occupation, and (b) every *citizen* of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. Similarly, Article 34 of the Arab Charter provides that “[e]very citizen shall have the right to work. The State undertakes to ensure employment for as many employment seekers as possible, while ensuring maximum state production, and the freedom to work and equality of opportunity without discrimination of any kind as to race, colour, sex, language, religion, political opinion, affiliation to a trade union, national or social origin, handicap or other status”.

Notwithstanding the ‘everyone’ or ‘as many employment seekers’ provision in the EU and Arab instruments respectively, stateless people like the Rohingyas and the Bidoons do not enjoy any

⁹⁰ Delia Rudan, Nationality and Political Rights, in in Alessandra Annoni & Serena Forlati, eds., *The Changing Role of Nationality in International Law* (Abingdon, Oxon: Routledge, 2013), 117 [footnotes omitted].

⁹¹ Van Waas, *supra*, note 62, at 21.

such rights.⁹² Available Human Rights Watch and Amnesty International reports show that the Rohingyas and the Bidoons are severely restricted from seeking employment.⁹³

Furthermore, and as observed above, most stateless individuals such as the Rohingyas and Bidoons are largely uneducated and unskilled, and as a result they do not really have any ‘free choice of employment’, even in places where they are allowed to work. Thus, they are usually consigned to doing mostly menial, unskilled, hard labor jobs.

2.4 Right to Social Security

Articles 22 and 25 of the UDHR provide that everyone has the right to social security, the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Article 9 of the ICESCR also obliges states parties to “recognize the right of everyone to social security, including social insurance”.⁹⁴ While it is acknowledged that the right to social security is generally not available in most countries, in the few countries that recognize and protect the right, stateless persons are not entitled to such right.⁹⁵ Under the European Convention, for example, the right is available only to “everyone

⁹² Article 17 and 18 of the Convention on the Status of Stateless Persons obliged states to accord the right to engage in “gainful employment” to stateless persons *lawfully staying in their territory*. Some states, for example, Italy, Mexico, Philippines, made reservation to the Treaty to effect that the Articles are ‘recommendations only’ and not binding on them. Status update of the 1954 Convention as at 20 August 2013 online: United Nations Treaty Collection <http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~3&chapter=5&Temp=mtdsg2&lang=en>.

⁹³ See for example, ICHR Report, *supra*, note 75, at 53; Amnesty 2004, *supra*, note 72, at 14 – 22. See also section 349 of the Constitution of Republic of the Union of Myanmar (Burma) 2008 which make the right to seek employment applicable only to citizens.

⁹⁴ See also Article 36 of the Arab Charter which makes this right available to ‘everyone’.

⁹⁵ See sections 349 – 351, 367 of the Constitution of Republic of the Union of Myanmar (Burma) 2008; It is important to note that Articles 23 and 24 of the Convention on the Status of Stateless Persons obliged states to accord “public service and assistance” and “social security” to stateless persons *lawfully staying in their territory* in the same way as they give their nationals. Several countries, including the UK, Sweden, Czech Republic, Denmark, Finland, Germany, Hungary,

residing or moving *legally*” within the European Union and its application is subject to “national laws and practice”.⁹⁶

2.5 Right to Recognition everywhere as a Person before the Law

Article 6 of the UDHR provides that “everyone has the right to recognition everywhere as a person before the law”. Like the UDHR, other international and regional human rights instruments also make this right available to ‘everyone’.⁹⁷ This right is one of the somewhat unique rights that arose directly from the atrocities of Nazi Germany;⁹⁸ one of which was a reported case in which a German court reportedly declared a person “legally dead”, and “of complete legal incompetence” and “lack of rights” simply because he was a Jew.⁹⁹ The reported reasoning of Nazi German Court was that “[j]ust as death makes someone incapable of carrying on physically... being a Jew made [the] man incapable of ‘carrying out his duties’ as the director of a film. His contract with the film production company was canceled because the man’s Jewishness made him legally dead.”¹⁰⁰ The right, as conceived in the UDHR, was intended to remove any such incapacity or disability and assert instead that everyone has “the ability ‘to be a bearer of rights, obligations and responsibilities’”.¹⁰¹ The right is known to include, “as a rule, the capacity to be a party to judicial proceedings”, that is, capacity to sue and be sued.¹⁰²

Latvia, Romanian, etc., raised different objections and reservations to the applicability of Articles 24 and 25 to stateless persons in their territory.

⁹⁶ Article 34 of the European Convention.

⁹⁷ Article 16 of the ICCPR; Article 3 of the American Convention; Article 5 of the Africa Charter; Article 22 of the Arab Charter.

⁹⁸ See generally, Johannes Morsink, *The Universal Declaration of Human Rights; Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999) 43 – 45 [Morsink].

⁹⁹ *Ibid.*, at 45 citing Ingo Muller, *Hitler’s Justice: The Courts of the Third Reich* (Cambridge, Mass: Harvard University Press, 1991) 116.

¹⁰⁰ *Ibid.* See also Sarah Josept, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2d (Oxford: Oxford University Press, 2004) 299 – 302: observes that “Jews in Nazi Germany were deprived of legal recognition; this denial was a precursor to the denial of all other human rights”.

¹⁰¹ Morsink, *supra*, note 98, at 44, citing E/CN.4/AC.1/SR.13/P.13.

¹⁰² Michael Bogdan, “Article 6” in A. Eide *et al*, eds., *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press, 1992) 111. See also Michael Bogdan & Brigitte Kofod Oslen “Article 6” in Gudmundur Alfredsson & Asbjorn Eide, eds., *The*

Closely related to this right of recognition is the principle that *all human beings are born free and equal in dignity and rights* stated in Article 1 of the UDHR.¹⁰³ In other words, every *person* or *Homo sapiens* is entitled to recognition as a ‘person’ and to be treated as having equal rights and obligation under the law, especially in relation to capacity to institute and defend legal proceedings. ‘Legal proceedings’ in this sense should be taken as relating to civil cases only. In relation to criminal proceedings, Arendt explains the status of the stateless person thus:

The best criterion by which to decide whether someone has been forced outside the pale of the law is to ask if he would benefit by committing a crime. If a small burglary is likely to improve his legal position, at least temporarily, one may be sure he has been deprived of human rights. For then a criminal offense becomes the best opportunity to regain some kind of human equality, even if it be as a recognized exception to the norm. The one important fact is that this exception is provided for by law. As a criminal even a stateless person will not be treated worse than another criminal, that is, he will be treated like everybody else. Only as an offender against the law can he gain protection from it. As long as his trial and his sentence last, he will be safe from that arbitrary police rule against which there are no lawyers and no appeals. The same man who was in jail yesterday because of his mere presence in this world, who had no rights whatever and lived under threat of deportation, or who was dispatched without sentence and without trial to some kind of internment because he had tried to work and make a living, may become almost a full-fledged citizen because of a little theft. Even if he is penniless he can now get a lawyer, complain about his jailers, and he will be listened to respectfully. He is no longer the scum of the earth but important enough to be informed of all the details of the law under which he will be tried. He has become a respectable person.¹⁰⁴

Thus, stateless people tend to suffer no discrimination in criminal proceedings. On the contrary, and as suggested by Arendt, committing crimes tend to be beneficial to their status. However, in relation to other proceedings, available evidence suggests that the right of recognition as a person before the law is generally unavailable for stateless people, who as beautifully captured by Arendt, “the world has found nothing sacred in the[ir] abstract nakedness”.¹⁰⁵ At the inter-state level, for example, there is a dictum of an international arbitral tribunal which declared that a state “does not commit an international delinquency in inflicting an injury upon an individual

Universal Declaration of Human Rights; A Common Standard of Achievements (The Hague: Kluwer Law International, 1999), 147 – 151 [Bogdan & Oslen].

¹⁰³ Bogdan & Oslen, *supra*, note 102, at 147.

¹⁰⁴ Arendt, *supra*, note 1, at 286 – 287.

¹⁰⁵ *Ibid*, 299.

lacking nationality, and consequently, no state is empowered to intervene or complain on his behalf either before or after the injury”.¹⁰⁶ Again, available evidence also suggests that stateless persons lack the requisite capacity to institute or defend an action in some jurisdictions. For example, Biancheria reviews a host of United States judicial decisions relating to the provisions of the United States Judicial Code,¹⁰⁷ which govern suits involving foreign parties.¹⁰⁸ She argues that the provision denies “persons considered stateless” access to the federal judicial system.¹⁰⁹ She concludes that “[t]he denial of access to federal courts exacerbates existing problems experienced by persons who are deemed stateless, a legal status which ‘entails a most severe and dramatic deprivation of the power of the individual’”.¹¹⁰ This position was observed by the Inter-American Court for Human Rights in *Case of the Girls Yean and Bosico v Dominican Republic* when it held that “[a] stateless person, *ex definitione*, does not have recognized juridical personality, because he has not established a juridical and political connection with any State; thus nationality is a prerequisite for recognition of juridical personality”.¹¹¹

¹⁰⁶ *Dickson Car Wheel Company (USA) v. United Mexican States* (1931) 4 Reports of International Arbitral Award 669 at 678.

¹⁰⁷ 28 U.S.C. § 1332 (1988).

¹⁰⁸ Christine Biancheria, “Restoring the Right to Have Rights: Statelessness and Alienage Jurisdiction in Light of *Abu-Zeineh v. Federal Laboratories, Inc.*” (1996) 11 Am. U. J. Intl L. & Pol’y 195, 196.

¹⁰⁹ *Ibid.*, at 196 – 197, n. 3: cites a number of cases including *Shoemaker v. Malaxa*, 241 F.2d 129 (2d Cir. 1957) (court dismissed the case because the defendant was stateless and therefore not within the jurisdiction of the court); *Factor v. Pennington Press, Inc.*, 238 F. Supp. 630 (N.D. fl1. 1964) (held that the plaintiff was a stateless person, and a stateless person is not a citizen of a state of the United States or of any foreign state).

¹¹⁰ *Ibid.*, at 198, citing Myres S. McDougal, *et al.*, “Nationality and Human Rights: The Protection of the Individual in External Areas” (1974) 83 Yale L.J. 900, 960. *Contra*, the European Court of Human Rights entertained the following cases which were brought by stateless persons: *Slavov v. Sweden*, (Application No. 44828/98, 29 June 1999, European Court of Human Rights, Strasbourg, 1999), *Okonkwo v. Austria* (Application No. 35117/97, 22 May 2001, European Court of Human Rights, Strasbourg, 2001), *Al-Nashif v. Bulgaria* (Application No. 50963/99, 20 June 2002, European Court of Human Rights, Strasbourg, 2002). Consequent upon these cases, van Waas notes that “the protection of the stateless has become an integral part of overall human rights protection and stateless individuals can rely on the international legal framework in the same way as persons who do hold a nationality”. See van Waas, *supra*, note 62, at 21.

¹¹¹ *Case of the Girls Yean and Bosico v Dominican Republic*, Preliminary objections, merits, reparations and costs; IACHR Series C no 130; IHRL 1514 (IACHR 2005), para. 178.

In modern times, possession of valid and proper legal identification documents is crucial to the exercise of this right of recognition as a person before the law, such that absence of proper identification documents becomes synonymous with nonexistence as a person. Hence, registration of births, marriage and death, possession of driver's license, passport etc., are now seen to be *sine qua non* to recognition as a person before the law.¹¹² For example, in March 2013, the UN Human Rights Council passed a Resolution on this right to recognition as a person before the law,¹¹³ which states that it is:

Recognizing the importance of birth registration, including late birth registration and provision of documents of proof of birth, as a means for providing an official record of the existence of a person and the recognition of that individual as a person before the law; expressing concern that unregistered individuals have limited or no access to services and enjoyment of all the rights to which they are entitled; also taking into consideration that persons without birth registration are vulnerable to lack of protection; and aware that registering a person's birth is a vital step towards the promotion and protection of all his or her human rights, and protection from violence, exploitation and abuse.¹¹⁴

A similar resolution passed in 2012 also "[took] into consideration that persons without birth registration may be vulnerable to statelessness and associated lack of protection; and [is] aware that registering a person's birth is a vital step towards his or her protection".¹¹⁵ Blitz, in his report for Refugee International sums up the position of stateless people in this regard as follows:

¹¹²See generally, Equal Rights Trust, *Unravelling Anomaly Detention, Discrimination and the Protection Needs of Stateless Persons* (London-UK: Equal Rights Trust, 2010) 5; Brad K. Blitz & Maureen Lynch, "Statelessness: The Global Problem, Relevant Literature, and Research Rationale" in Brad K. Blitz & Maureen Lynch, eds., *Statelessness and Citizenship: A Comparative Study on the Benefit of Nationality* (Oxford: Oxford Brookes University, 2009) 1, at 10; van Waas, *supra*, note 59, at 29; Arendt, *supra*, note 1, at 287; Brad K. Blitz, *Statelessness, Protection and Equity* (Forced Migration Policy Briefing 3) (Refugees Studies Centre- University of Oxford, 2009), 6 – 9, [Blitz] online: Refugees Studies Centre <<http://www.rsc.ox.ac.uk/publications/policy-briefings/RSCPB3-Statelessness.pdf>>.

¹¹³ UN Human Rights Council, *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law*, 19 March 2013, A/HRC/22/L.14/Rev.1, available online: OHCHR <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=21400>.

¹¹⁴ *Ibid*, eighth preambular paragraph.

¹¹⁵ Sixth preambular paragraph, UN Human Rights Council, *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law*, 3 April 2012, A/HRC/RES/19/9, available at: <http://www.refworld.org/docid/503cdba52.html> [accessed 11 June 2013].

All too often, the births, marriages, and deaths of stateless people are not certified and, as a result, many stateless persons lack even basic documentation. This lack of identification means that they are often powerless to seek redress through the courts.¹¹⁶

In relation to the Rohingyas and Bidoons, they are denied access to crucial legal identification documents by the Burmese and Kuwaiti governments respectively. This denial effectively robs them of any means to assert their right to recognition as persons before the law since they are unable to prove their ‘existence’. For example, and as noted in chapter one, a 2005 Parliamentary Committee reported that the Bidoons “are not allowed to get driving licenses or any other form of identification from government offices... are also deprived of any right of possession of personal identity or anything to prove their legal residence. They cannot register births, marriages, divorces and death”.¹¹⁷ Although some Rohingyas have government-issued “white card” or “temporary registration cards” which do not imply any citizenship rights,¹¹⁸ available evidence suggests that they also suffer severe restriction in registering births, marriage and death.¹¹⁹ According to a Human Rights Watch Report, “[m]ost Rohingya lack formal documents, and even those who come from families that have lived in Burma for generations do not have any way of providing ‘conclusive evidence’ of their lineage in Burma prior to 1948, let alone prior to 1823, denying them Burmese citizenship”.¹²⁰ The report also found many Rohingyas lost their documents in arson attacks during the violence of June 2012, or had the documents forcibly taken away from them by local authorities.¹²¹

¹¹⁶ Blitz, *supra*, note 112, at 6.

¹¹⁷ Parliamentary Committee for Defending Human Rights in Kuwait, June 2005, 9th session, quoted in Abbas Shiblak, “Arabia’s Bidoon” in Brad K Blitz & Maureen Lynch, eds., *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* (Cheltenham-UK: Edward Elgar, 2011) 172, at 178 [Shiblak].

¹¹⁸ Human Rights Watch, “‘All You Can Do is Pray’ Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State” April 2013 Report, p. 110, online: HRW <http://www.hrw.org/sites/default/files/reports/burma0413webwcover_0.pdf> [HRW 2013].

¹¹⁹ See Lewa, C. “North Arakan: an open prison for the Rohingya in Burma”, *Forced Migration Review*, Issue 32, April 2009, p. 12, available at <<http://www.fmreview.org/FMRpdfs/FMR32/FMR32.pdf>>: the author suggests the government stopped issuing birth certificates to Rohingya children in 1994. See also ICHR Report, *supra*, note 75, at 96 – 98; Amnesty 2004, *supra*, note 72, at 28 – 30.

¹²⁰ HRW 2013, *supra*, note 118, at 112.

¹²¹ *Ibid.*

2.6 Freedom against (Racial) Discrimination

The prohibition against discrimination in the application of human rights provisions has become a fundamental principle of international human rights law. Hence, virtually all international and regional human rights contain provisions prohibiting discrimination. For example, Article 2 of the UDHR declares that “everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty”.¹²² Article 1 of the American Convention also provides that the States Parties to the Convention “undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”. More importantly, sub-article 2 states that “[f]or the purposes of this Convention, ‘person’ means every human being”.¹²³ The Convention on the Elimination of All Forms of Racial Discrimination¹²⁴ defines ‘racial discrimination’ as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.¹²⁵ Thus, the crux of this prohibition against discrimination is that all persons or, in the words of the American Convention, ‘every human being’ is entitled to the human rights set out in the relevant instruments. Some authors have rightly observed that this rule against discrimination is now part

¹²² UDHR, Article 2.

¹²³ See also Article 2 of the ICCPR, Article 2(2) of ICESCR; Article 21 of European Convention; Article 3 of Arab Convention; Article 2 of African Charter.

¹²⁴ (1966) 660 U.N.T.S. 195.

¹²⁵ *Ibid*, Article 1(1).

of customary international law.¹²⁶ And as noted above, the decision of the ICJ in the *Barcelona Traction case* specifically referred to protection of this right as an *erga omnes* obligation.

However, available evidence suggests that the Rohingyas and Biddons do not enjoy this right within and outside their respective countries, by reason of their statelessness. As shown in chapter one, the Rohingyas and Bidoons, in Burma and Kuwait respectively, are not allowed to participate in the political affairs of their respective countries. Unlike other ethnic groups in their respective countries, they face severe restriction in areas of access to health care, education, employment, freedom of movement, etc., because they are not regarded as citizens of their respective countries.

Also relevant is the actual and potential discrimination the Rohingyas and Bidoon face outside their borders as a result of their statelessness. Arendt observes the ‘damage’ “statelessness did to the time-honored and necessary distinctions between nationals and foreigners, and to the sovereign right of states in matters of nationality and expulsion” and how the stateless occupy a unique disadvantaged position that makes them to be treated differently in international law.¹²⁷ In other words, because they are stateless, they are treated differently or discriminatorily from other aliens/foreigners by various nations. For example, Italy is a party to both the 1954 Convention on the Status of Stateless Person and the Convention on the Relating to the Status of Refugees.¹²⁸ Articles 17 and 18 of both conventions deal with the right to employment of stateless persons and refugees in the territory of contracting States respectively. While Italy accepted to “accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances”, it entered a reservation to a similar provision in respect of stateless people. Thus, Italy effectively does not allow stateless people to enjoy the same rights available to ‘refugees’ and other aliens.

¹²⁶ See generally, Morsink, *supra*, note 104, at 102 – 109; Sigrun Skogly, “Article 2” in Gudmundur Alfredsson & Asbjorn Eide, eds., *The Universal Declaration of Human Rights: A Common Standard of Achievements* (The Hague: Kluwer Law International, 1999), 75 – 87; Sigrun Skogly, “Article 2” in A. Eide, *et al*, eds., *The Universal Declaration of Human Rights: A Commentary* (Oslo: Scandinavian University Press, 1992), 57 – 71.

¹²⁷ See Arendt, *supra*, note 1, at 286.

¹²⁸ (1951) 189 U.N.T.S 150.

2.7 Right to Education

Article 26 of the UDHR provides that everyone has a right to education which shall be free and compulsory, at least in the elementary stage. It also provides that “higher education shall be equally accessible to all on the basis of merit”. Apart from the UDHR, some regional instruments (the Africa Charter and Europe Convention) also make the right available to ‘everyone’ or ‘every individual’.¹²⁹ However, in practice, the statelessness of the Rohingyas and the Bidoons excludes them from the application of this right to education.¹³⁰ A recent Human Rights Watch report (2013) finds that the Burmese government has “systematically violated the Rohingyas’ right to education” and “education for their children has been unavailable”.¹³¹ The violations, according to the report, “stem from the Rohingya’s lack of Burmese citizenship, and are discriminatory measures based on the racial and religious identity of the group”.¹³² Similarly, the statelessness of the Bidoons has also impeded their qualification for the exercise of this right to education in Kuwait.¹³³

It is also necessary to note the effect of globalization on contemporary education. As a result, it is common place to find nationals from different countries in several universities. It is thus arguable that the modern expression of the right of “access to higher education” under Article 26 of the UDHR includes application for admission to foreign universities. However and unfortunately, stateless persons are unwittingly excluded from exercising this *right* in its modern form, that is, to seek “higher education” abroad, due to the admission process adopted by most universities: online application for admission. This is because it is virtually impossible to submit an online application for admission for some universities without stating one’s citizenship. In this respect, some schools do not have ‘Stateless’ as a ‘country’ option, in order to accommodate stateless persons. For these schools, unless the prospective applicant indicates his/her

¹²⁹ See Article 14 of European Convention; Article 17 of African Charter.

¹³⁰ In Burma, the right to education is available only to citizens under Section 366 of the Constitution of Republic of the Union of Myanmar (Burma) 2008. Article 41(1) of the Arab Charter also makes the right available only to ‘citizens’.

¹³¹ HRW 2013, *supra*, note 118, at 82.

¹³² *Ibid*, at 77.

¹³³ See Open Society Institute and Refugees International, *Without Citizenship; Statelessness, Discrimination and Repression in Kuwait*, 13 May 2011, p.8.

‘citizenship’, he/she cannot proceed to the next stage of the application.¹³⁴ Again, even the few schools that have ‘stateless’ as an option, still require prospective applicants to enter passport or travelling document number.¹³⁵ As shown previously, a vast majority of stateless people do not have valid travel or legal documents. This effectively prevents them from exercising the right to seek higher education in foreign universities.

The above discussion, on the relationship between the right to nationality and the enjoyment of other international human rights, shows that the right to nationality is not only “essential to the enjoyment of all other rights”, it is also required for “good human development”.¹³⁶ For this reason, the right to nationality is a *basic* human right for the purpose of determining *erga omnes* obligation – according to the *Barcelona Traction case*.

3.0 DENATIONALIZATION: A STEP TOWARDS GENOCIDE?

As noted above, the ICJ in the *Barcelona Traction case* specifically referred to the outlawing of acts of genocide as *erga omnes* obligation. Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide states that the term ‘genocide’ means:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;

¹³⁴ For example, University of Saskatchewan, online application for admission available at <<http://www.usask.ca/admission/>>; University of Toronto, online application for admission available at <<http://www.adm.utoronto.ca/admissions/>>; University of Liverpool, online application for admission available at <<http://www.liv.ac.uk/study/postgraduate/applying/online/>>; University of Alberta, online application for admission available at <<https://gandalf.registrar.ualberta.ca/Admission/Application/start-page>>.

¹³⁵ For example, Cambridge University, online application for admission available at <<http://www.ucas.com/apply>>; University of Regina, online application for admission available at <https://banner.uregina.ca/prod/sct/bwskalog.P_DisLoginNon>.

¹³⁶ See notes 43 – 44 and accompanying text above.

(e) Forcibly transferring children of the group to another group.¹³⁷

According to Kirsch, the above definition represents the ‘legal’ concept of genocide.¹³⁸ He notes that “most people do not refer to a legal definition when talking about genocide”,¹³⁹ but rather they use the “social concept” which is used “simply to describes the occurrence of mass killings or ethnic cleansing based on discriminatory motives”.¹⁴⁰ Genocide, according to him, does not require “successful destruction of a whole race or ethnicity nor even that crimes have occurred on a mass scale”. It “simply calls for a serious attack on members of a national, ethical, racial or religious group”.¹⁴¹ There is also the *mens rea* requirement of genocide; this means that the perpetrators must act with intent to destroy, in whole or part, a national, ethnical, racial or religious group as such.¹⁴² This also involves a ‘systemic’ operation, that is, a ‘plan’ to commit genocide.¹⁴³ Proof of intent may be inferred from “the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts”.¹⁴⁴

¹³⁷ For a general discussion of the concepts and elements of genocide: see A. Dirk Moses, “Moving the Genocide Debate Beyond the History Wars” (2008) 54 *Australian Journal of Politics and History* 248, at 255 – 259; Stefan Kirsch, “The Social and the Legal Concept of Genocide” in Paul Behrens & Ralph Henham, eds., *Elements of Genocide* (Oxon: Routledge, 2013) 7 – 19 [Kirsch]; Caroline Fournet, “The *Actus Reus* of Genocide” in Paul Behrens & Ralph Henham, eds., *Elements of Genocide, supra*; Paul Behrens, “The *Mens Rea* of Genocide” in Paul Behrens & Ralph Henham, eds., *Elements of Genocide, supra*; Thomas Cushman, ‘Is Genocide Preventable? Some Theoretical Considerations’ (2003) 5 *Journal of Genocide Research* 523; Paul Boghossian, “The Concept of Genocide” (2010) 12 *Journal of Genocide Research* 69; Paul Boghossian, “The Concept of Genocide: A Response to My Critics” (2010) 12 *Journal of Genocide Research* 105; A. Dirk Moses, “Raphael Lemkin, Culture, and the Concept of Genocide” in Donald Bloxham & A. Dirk Moses, eds., *The Oxford Handbook on Genocide Studies* (Oxford: Oxford University Press, 2010) 19 – 41; Geoffrey Brahm Levey & A. Dirk Moses, ““The Muslims are our Misfortune!’,” in Greg Noble, ed., *Lines in the Sand: The Cronulla Riots and the Limits of Australian Multiculturalism* (Sydney: Institute of Criminology, 2009), 95 – 110.

¹³⁸ Kirsch, *supra*, note 137, at 10.

¹³⁹ *Ibid*, at 7.

¹⁴⁰ *Ibid*, at 8.

¹⁴¹ *Ibid*, at 10.

¹⁴² *Ibid*, at 11.

¹⁴³ *Ibid*, at 12 – 15.

¹⁴⁴ *Prosecutor v Jelistic*, IT-95-10-A, Judgment of Appeal Chambers, 5 July 2001, para 47. See also Kirsch, *supra*, note 137, at 16 – 17.

Dr. Stanton, the President of Genocide Watch, has outlined what he called the “eight stages or operational processes” of genocide. These are: (i) classification, (ii) symbolization, (iii) dehumanization, (iv) organization, (v) polarization, (vi) preparation, (vii) extermination, and (viii) denial.¹⁴⁵ The first six have been described as ‘Early Warnings’.¹⁴⁶

At the ‘Classification’ stage, social groups are classified into the “us versus them”. This classification becomes symbolized at the ‘Symbolization’ stage.¹⁴⁷ During the Symbolization state, the targeted group is often required to wear an identifying symbol or distinctive clothing, for example the yellow star by the Jews of Nazi Germany. The Khmer Rouge forced people from the Eastern Zone to wear a blue-checked scarf, marking them for forced relocation and elimination. They may also be given a special ID card.¹⁴⁸

According to Stanton, ‘Dehumanization’ is “where the death spiral of genocide begins”.¹⁴⁹ The target group is “dehumanized” and called the “names of animals or likened to a disease: vermin or rats, cancer or plague, or in Rwanda, ‘*inyenzi*’ — cockroaches”.¹⁵⁰ This stage is necessary to give “ideological justification to the genocidaires” and to overcome the “normal human revulsion against murder”.¹⁵¹ At this stage too, hate propaganda in print and on hate radios is used to vilify

¹⁴⁵ Gregory Stanton, “The 8 Stages of Genocide”, a briefing paper presented to the US State Department, 1996. Online: Genocide Watch
<<http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html>>; see also Gregory Stanton, “The Eight Stages of Genocide and Preventing Genocide”, Genocide Watch, May 2008.

¹⁴⁶ For general information on the “Early Warning” (EWs), see Lawrence Wocher, “Developing a Strategy, Methods and Tools for Genocide Early Warning” a report prepared for the Office of the Special Adviser to the UN Secretary-General on the Prevention of Genocide (New York: Center for International Conflict Resolution, Columbia University, 2006) available online: UN
<<http://www.un.org/en/preventgenocide/adviser/pdf/Wocher%20Early%20warning%20report,%202006-11-10.pdf>>; Deborah Mayersen, “Current and Potential Capacity for the Prevention of Genocide and Mass Atrocities within the United Nations System” (2011) 3 Global Responsibility to Protect 197 – 222; Barbara Harff, “No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955” (2003) 97 American Political Science Review 57.

¹⁴⁷ See Gregory Stanton, “Could the Rwandan genocide have been prevented?” (2004) 6 Journal of Genocide Research 211, at 213.

¹⁴⁸ *Ibid.*, at 213 – 214.

¹⁴⁹ *Ibid.*, at 214.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

the target group and depict them as ‘outsiders’ or some ‘devils’ that must be resisted. For example, prior to the Rwanda genocide, the Hutu Power hate newspaper, *Kangura*, published the “Ten Commandments of the Hutu” which, amongst others, expounded a myth that the Tutsis had invaded the country from Ethiopia. Tutsis were also referred to as “devils”, who ate the vital organs of Hutus.¹⁵² The next stage is ‘Organization’. Genocide is always organized, often by the state, or through militias who are often trained and armed by the state.¹⁵³ During the ‘Polarization’ stage, there is a “systematic elimination of moderates who would slow” the “downward cycle of killings until, like a whirlpool, it reaches the vortex of mass murder”.¹⁵⁴ At this stage, there could also be killings by one group in order to provoke revenge killings by the other. Such massacres are aimed at polarization.¹⁵⁵

During the ‘Preparation’ stage, death lists are compiled, houses marked, and maps drawn up for the purpose of identification. Trial massacres may also be conducted, according to Stanton, “both as training for the genocidists, and to test whether there will be any response, such as arrests, international denunciations, or sanctions. If the murderers get away with their crimes, if there is impunity, it is a green light to finish the genocide”.¹⁵⁶ Preparation may also include herding of the victims into ghettos, stadiums, or churches.¹⁵⁷ ‘Extermination’ stage is, ‘the final solution’: the actual killing which is legally defined as genocide. This is followed by ‘Denial’. At this stage the mass graves are dug up and hidden. The historical records are burned, or closed to historians.¹⁵⁸

It is necessary to recall that one of the issues that emerged from the Nuremburg Trials was the argument that the Holocaust did not start with the inhuman hauling of the victims into the gas chambers, but rather it actually started with the 1935 Reich Citizenship Law which denationalized a large number of Jews and Romas.¹⁵⁹ Thus, denationalization was seen as the

¹⁵² *Ibid.*

¹⁵³ *Ibid.*, at 215.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*, at 216.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*, at 217.

¹⁵⁹ See generally, Morsink, *supra*, note 93, at 80 – 83.

first step towards the Holocaust, as it laid the foundation for the massive deportations of the victims to concentration camps, and there was nothing the international community could do in aid of the denationalized people,¹⁶⁰ perhaps because, as noted above, a state is deemed not to have committed “an international delinquency in inflicting an injury upon an individual lacking nationality”.¹⁶¹

Using the events that preceded the holocaust, as well as other incidences and allegations of genocide in the twentieth century, the denationalization of a targeted ethnic group by a state warrants the question whether it is an ‘early warning’ or ‘step’ towards genocide. The next section will examine this question in relation to the Rohingyas.

3.1 ‘Genocide’ Against the Rohingyas?

Although the Rohingyas have had a history of ethnic clashes with other ethnic groups in Burma, their situation has been worsened by the Citizenship Law 1982, which formally denationalized the Rohinyas – making the Rohingyas the “them” or “outsiders” in the *us versus them* stratification. They constantly suffer violence in the hands of Burmese Security agents (especially the dreaded NaSaKa) and other militia, whose campaigns of violence against them usually include mass murder, rape, torture, degrading treatment, and forced displacement. This suffering, as reportedly admitted recently by the Burmese information minister, is as a result of their statelessness.¹⁶² However, the increased intensity of the violent attacks on the Rohingyas in recent times has triggered genocide alerts from human rights agencies.¹⁶³

The Rohingyas, being generally Muslims, are *classified* as the “other” or “them” in Buddhists-dominated Burma. The continuous reference to the Rohingyas as “Bengalis” by Burmese government falls under *symbolization* and this ‘symbolization’ has become the basis for

¹⁶⁰ *Ibid.*, at 80.

¹⁶¹ *Dickson Car Wheel Company (USA) v. United Mexican States*, *supra*, note 106.

¹⁶² See pages 10 – 13 above.

¹⁶³ A commentator has observed that the eight stages of genocide developed by Genocide Watch “are rolling by at a distressingly speedy clip in 2013 Burma”. See Faine Greenwood, “The 8 Stages of Genocide Against Burma’s Rohingya”, online: UN Dispatch <<http://www.undispatch.com/the-8-stages-of-genocide-against-burmas-rohingya>>.

dehumanizing the Rohingyas through hate speech and propaganda which, as noted above, is one of the features of the dehumanization stage. For example, a recent 2013 Human Rights Watch report observes that “[b]eginning in June 2012, Arakanese political parties, local monks’ associations, and Arakanese civic groups made public statements and issued numerous pamphlets that directly or indirectly urged the ethnic cleansing of Rohingya from Arakan State and the country. The statements and pamphlets typically deny the existence of the Rohingya ethnicity, demonize the Rohingya, and call for their removal from the country”.¹⁶⁴ The report also observes that local Buddhist monks have circulated pamphlets telling the local Arakanese population that they “must not” do business with or associate with the “Bengalis” [Rohingya] because “the ‘Bengalis’ [Rohingya] who dwell on Arakanese land, drink Arakanese water, and rest under Arakanese shadows are now working for the extinction of the Arakanese”.¹⁶⁵

The numerous hate speeches and propaganda may have influenced the *organized* or coordinated mob attacks against the Rohingyas following the alleged rape and murder of an Arakan woman in May 2012 by ‘Muslims’.¹⁶⁶ The coordinated attacks resulted in several deaths and displaced about 100,000 Rohingyas. More importantly, Human Rights Watch confirmed that local police and soldiers stood by and watched the killings without intervening.¹⁶⁷ Available reports suggest that the hate speeches have also *polarized* Arakan society. Human Rights Watch observed cases where the local political parties have “issued warnings and threats against Arakanese found to be aiding or associating with Rohingya in any way”.¹⁶⁸ Two photos have emerged online which reportedly show two Arakanese men, who were found providing food to Rohingyas, shackled and a homemade sign placed around the neck of one of them stating “I am a traitor and slave of kalar”.¹⁶⁹ According to the report, “local Arakanese sympathetic to the plight of the Rohingya explained to Human Rights Watch that it would be extremely dangerous for them to go near the Rohingyas [internally displaced persons] camps, let alone provide aid. They feared they might

¹⁶⁴ HRW 2013, *supra*, note 118, at 24.

¹⁶⁵ *Ibid*, at 25.

¹⁶⁶ See generally Human Rights Watch “‘The Government Could Have Stopped This’ Sectarian Violence and Ensuing Abuses in Burma’s Arakan State’ August 2012 Report, 12 online: HRW <http://www.hrw.org/sites/default/files/reports/burma0812webwcover_0.pdf> [HRW 2012].

¹⁶⁷ *Ibid*, at 1 – 3.

¹⁶⁸ HRW 2013, *supra*, note 118, at 27.

¹⁶⁹ *Ibid*, the term “Kalar” is a racial slur used to describe the Rohingyas.

experience violence from their own community that would regard their actions as ‘traitorous’.”¹⁷⁰

The *preparation* stage seems to have started. On 5 July 2012, Buddhist monks representing the sangha in Rathedaung Township reportedly held a meeting and subsequently issued a 12-point statement which “unabashedly” set out a plan for “‘Arakan Ethnic Cleansing Program’ of bad pagan Bengali (kalar)”.¹⁷¹ This was followed by another two-day public meeting “billed as the largest public meeting in modern Arakan history”. The meeting was held in late September 2012 and the “discussion focused almost completely on the Rohingya”.¹⁷² The public statement released after the meeting calls for the establishment of a “rule to control the birth rate of the Muslim Bengali community living in Arakan”.¹⁷³ It also calls for the establishment of a “peoples militia” in all ethnic villages and for the supply of “sophisticated arms” to “the people’s militia”.¹⁷⁴ The statement also calls for strict adherence to the 1982 Citizenship Law, which has effectively prevented the Rohingya from obtaining Burmese citizenship.¹⁷⁵ In addition, as noted in chapter one, there has been several mass killings of the Rohingyas over a long period of time.¹⁷⁶ Such killing may be evidence of “trial massacres”, which Genocide Watch has argued is used to “test” whether there will be any response, such as arrests, international denunciations, or sanctions.¹⁷⁷

The question now is: has the “final solution” or “extermination” stage started? This stage is the actual killing or commission of other acts that fall within the legal definition of “genocide” set out above. As rightly observed by Kirsch, ‘genocide’ “carries an unmatched rhetorical power and politicians and diplomats all over the world are aware of the stigma brought about by allegations that genocide has been committed.”¹⁷⁸ Thus, an allegation of “genocide” is a very serious one

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*, at 25 – 26.

¹⁷² *Ibid.*, at 27.

¹⁷³ *Ibid.*, at 30.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ See pages 10 – 13 above.

¹⁷⁷ See note 156 and the accompanying text above.

¹⁷⁸ Kirsch, *supra*, note 137, at 8.

and this, perhaps, calls for the adoption of a cautious approach in describing the often reported mass killings of the Rohingyas. Various human rights agencies seem to have adopted this cautious approach. For example, there is a 2006 report which concludes that “[t]he campaign of displacement, denial of culture and identity, restrictions on the right to marry and form a family, killings, rape, torture and denial of food are a slow-burning genocide – ‘deliberately inflict[ing] on the group [Rohingya and Arakan Muslims] conditions of life calculated to bring about its physical destruction in whole or in part’.”¹⁷⁹ Similarly, a 2010 report found “reliable body of evidence of acts constituting a widespread or systematic attack against the Rohingya civilian population in North Arakan State. These appear to satisfy the requirements under international law and confirm the perpetration of *crimes against humanity*.”¹⁸⁰ There is also the recent 2013 Human Rights Watch report, which although setting out gory details of mass killings of the Rohingyas by security forces and militia,¹⁸¹ concludes that “the criminal acts committed against the Rohingya and Kaman Muslim communities in Arakan State beginning in June 2012 amount to *crimes against humanity carried out as part of a campaign of ethnic cleansing*”.¹⁸² In other words, most reports ostensibly stop short of calling actual violence against the Rohingyas “genocide” but rather use terms like “crimes against humanity”¹⁸³ or “ethnic cleansing”.¹⁸⁴ The same lens of “ethnic cleansing” has been used in recent reports (2013) which have revealed that the Burmese government had discriminatorily imposed a two-child limit on the Rohingyas.¹⁸⁵

¹⁷⁹ See ALTSEAN-Burma, “Rohingyas and Muslims in Arakan State: A Slow-Burning Genocide” (2006) 1, online: ALTSEAN <<http://www.altsean.org/Docs/PDF%20Format/Thematic%20Briefers/Rohingya%20And%20Muslims%20In%20Arakan%20State%20-%20Slow-Burning%20Genocide.pdf>>.

¹⁸⁰ ICHR Report, *supra*, note 75, at 150 (emphasis supplied).

¹⁸¹ HRW 2013, *supra*, note 118, at 65 – 71, 117 – 130.

¹⁸² *Ibid*, at 11 (emphasis supplied).

¹⁸³ See Article 7 of the Rome Statute of the International Criminal Court (2187 U.N.T.S. 90).

¹⁸⁴ Unlike “crimes against humanity” there is no international instrument defining “ethnic cleansing”. For a general discussion on “ethnic cleansing”, see Daniele Conversi, “Cultural Homogenization, Ethnic Cleansing, and Genocide” in Denmark, R. A., ed., *The International Studies Encyclopedia* (Oxford/ Boston, MA: Wiley-Blackwell (ENMISA), 2010), 719 – 742; Damir Mirkovic, “Ethnic Conflict and Genocide: Reflections on Ethnic Cleansing in the Former Yugoslavia” (1996) 548 *Annals of American Academy of Political and Social Science* 191, at 196.

¹⁸⁵ See generally, Associated Press, “Burmese Muslims Given Two-Child Limit” 25 May 2013, online: The Guardian <<http://www.guardian.co.uk/world/2013/may/25/burma-muslims-two-child-limit>>; BBC, “Aung San Suu Kyi condemns Rohingya 'two-child policy'” 27 May 2013,

According to Brad Adams, the Asian director at Human Rights Watch, “[i]mplementation of this callous and cruel two-child policy against the Rohingya is another example of the systematic and wide ranging persecution of this group, who have recently been the target of an ethnic cleansing campaign.”¹⁸⁶

Scholars have noted the similarities and difference between “genocide” and “ethnic cleansing”. According to Lieberman, “[e]thnic cleansing shares with genocide the goal of achieving purity but the two can differ in their ultimate aims: ethnic cleansing seeks the forced removal of an undesired group or groups where genocide pursues the group's ‘destruction’. Ethnic cleansing and genocide therefore fall along a spectrum of violence against groups with genocide lying on the far end of the spectrum.”¹⁸⁷ Schabas also drew a distinction between the two based on intent. According to him, whilst the intent of ‘ethnic cleansing’ is to drive out a population, the specific intent of genocide is to destroy it.¹⁸⁸ On the other hand, Blum *et al* have argued that “ethnic cleansing” is an euphemism for genocide and its use “signals the lack of will to stop genocide, resulting in huge increases in deaths, and undermines international legal obligations of acknowledging genocide”.¹⁸⁹ They also argued that the distinction that has been drawn between genocide and ethnic cleansing “ignores the fact that genocidal massacres often have both intents”, that is, genocidal massacres may seek to “intentionally destroy a substantial part of an ethnic group, the specific intent necessary to prove genocide, and also have the intent to terrorize

online: <<http://www.bbc.co.uk/news/world-asia-22681192>>; Chris Lewa, “Two-Child Policy in Myanmar will Increase Bloodshed” 6 June 2013, online: CNN <<http://www.cnn.com/2013/06/06/opinion/myanmar-two-child-policy-opinion>>; Jason Szep & Andrew R.C. Marshall, “Myanmar Minister backs Two-Child Policy for Rohingya Minority”, 11 June 2013, online: <<http://www.reuters.com/article/2013/06/11/us-myanmar-rohingya-idUSBRE95A04B20130611>>.

¹⁸⁶ Human Rights Watch, “Burma: Revoke ‘Two-Child Policy’ For Rohingya” 28 May 2013 (News), online: <<http://www.hrw.org/news/2013/05/28/burma-revoke-two-child-policy-rohingya>>.

¹⁸⁷ Benjamin Lieberman, “‘Ethnic Cleansing’ versus Genocide?” in Donald Bloxham & A. Dirk Moses, eds., *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press, 2010) 42.

¹⁸⁸ Williams Schabas, *Genocide in International Law* (Cambridge: University of Cambridge Press, 2000), 200.

¹⁸⁹ Rony Blum *et al*, “‘Ethnic Cleansing’ bleaches the Atrocities of Genocide” (2007) *European Journal of Public Health*, 1 – 6.

a population into flight or forced deportation.”¹⁹⁰ Some authors also have noted the similarities and distinction between “genocide” and “crimes against humanity”. According to Wald, crimes against humanity “require that the acts prosecuted be part of a systematic or widespread attack against a civilian population (and the perpetrator knows about the wider campaign). Genocide requires that the acts (which can only be the specific five listed) be committed against a racial, religious, national or ethnic group and be done with the specific intent of destroying the group in whole or in part ‘as such’.”¹⁹¹

In the above premise, it seems that a finding of “intent to destroy, in whole or in part” is key to the determination of whether or not ‘genocide’ in the legal sense has been committed or started against the Rohingyas. Although, as noted above, the Rohingyas have been victims of massacres, discriminatory birth-control, restricted marriages, forced displacement, forced labor etc., it is difficult to assert that their travails evidence the requisite “intent to destroy”. The ultimate aim of the mass murder and other human rights violations seem to be to drive the Rohingyas out of Burma. This aim tends to align with the definition of ethnic cleansing which according to a UN General Assembly is also “a form of genocide”.¹⁹² It also aligns with crime against humanity. However, it is hardly disputable that the Rohingyas are just a step away from being victims of genocide based on the Genocide Watch scale.

It is useful to bear in mind that the foregoing is not intended to suggest that denationalization has always preceded every genocidal event in the past. For example the victims of the 1994 Rwandan genocide (Tutsi and moderate Hutus) were not denationalized prior to the genocide. The 1995 Bosnian genocide was not also preceded by denationalization. However, a review of previous cases of genocide would suggest that genocide usually involves the “us versus them”

¹⁹⁰ *Ibid*, at 3.

¹⁹¹ Patricia M. Wald, “Genocide And Crimes Against Humanity” (2007) 6 Washington University Global Studies Law Review 621, See also Darryl Robinson, “Defining ‘Crimes Against Humanity’ at the Rome Conference” (1999) 93 AJIL 43; Human Rights Watch, “Genocide, War Crimes and Crimes Against Humanity A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia” (2006 report), 192 – 233; Human Rights Watch, “Genocide, War Crimes and Crimes Against Humanity: A Digest of the Case Law of the International Criminal Tribunal for Rwanda” (2010 report) 82 – 146.

¹⁹² Ninth preambular paragraph, UNGA, The situation in Bosnia and Herzegovina, A/RES/47/121, 18 December 1992.

classification and nationality has been a major factor in this classification. For example, as noted above, one of the propaganda against the Tutsi prior to the Rwanda genocide was that they were foreigners from Ethiopia.¹⁹³ Thus, the conception of the genocidal victims as not being “one of us” *dehumanizes* them and also removes the natural repulsion that would have accompanied the killing of “one of us”.

In the case of the Rohingyas, their denationalization or condition of statelessness complicates issues for them as genocide victims: not only are they not “one of us” (in Burma), they are also not “one of” any other “us” in the community of nations. This results in a somewhat *neither here nor there* situation for stateless genocidal victims. In other words, the statelessness of genocide victims makes it difficult to properly classify their travails under international law. For example, if the ostensible aim of the persecution is to drive the otherwise stateless genocide victims out of the country, the “genocide” may become blurred by the perception of their travails as an exercise of the right of every sovereign nation to expel foreigners from their country. The resultant effect of this blurred conception is that, at worst, the genocidal actions will be seen as “ethnic cleansing” which unlike genocide does not usually evoke too much international pressure or intervention.¹⁹⁴

Another complication that may arise from the statelessness of genocide victims relates to difficulty in finding legal bases for other nations to intervene on their behalf, especially in view of the dictum in the *Dickson Car Wheel case* that a state “does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently no state is empowered to intervene or complain on his behalf either before or after the injury”.¹⁹⁵ This difficulty may also affect the ability of states to invoke the international humanitarian law doctrine of “responsibility to protect” (R2P) on behalf of stateless people.

¹⁹³ See note 152 and the accompanying text above.

¹⁹⁴ See notes 187 – 191 and the accompanying text on the difference between ‘genocide’ and ‘ethnic cleansing’.

¹⁹⁵ *Dickson Car Wheel Company (USA) v. United Mexican States*, *supra*, note 106, at 678.

The doctrine of R2P was accepted by the UNGA at the 2005 World Summit.¹⁹⁶ The Summit Outcome Document sets out the “three pillars” of R2P. These are: (a) each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity, (b) the international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability, and (c) the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity - this may include the use of military action, where peaceful means are inadequate and the national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁹⁷ The formulation of these three pillars is greatly influenced by a 2001 report of the International Commission on Intervention and State Sovereignty (ICISS).¹⁹⁸

Although the Outcome Document made reference to “its population”, a review of the ICISS report, as well as some other literatures on R2P, suggests that the ICISS report contemplates the responsibility of the state to its “citizens”. In other words, a state must have failed in its duty to protect its “citizens” before R2P may be invoked by the international community.¹⁹⁹ However, it

¹⁹⁶ For general information on the evolution of R2P in international law, see Jennifer M. Welsh, “Implementing the ‘Responsibility to Protect’: Where Expectations Meet Reality” (2010) 24:4 Ethics & International Affairs 415 – 430 [*Welsh, 2010*]; Carsten Stahn, “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?” (2007) 101:1 AJIL 99 at 99 – 102 [*Stahn*]; Luke Glanville, “The Responsibility to Protect Beyond Borders” (2012) Human Rights Law Review 1 at 8 – 15 [*Glanville*].

¹⁹⁷ UNGA, World Summit Outcome, A/Res/60/1, 25 October 2005, paras 138 – 139, online: UN <<http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf>> (emphasis supplied).

¹⁹⁸ See Glanville, *supra*, note 196, at 21; Welsh, 2010 *supra*, note 196, at 417 – 418; Stahn, *supra*, note 196, at 99. See also Jennifer Welsh, “The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty” (2002) 57:4 International Journal 489 – 512 [*Welsh, 2002*].

¹⁹⁹ See, ICISS, *The Responsibility to Protect* (A Report International Commission on Intervention and State Sovereignty) (Ottawa: International Development Research Centre, 2001) VIII: the “central theme” of the report is “the idea that sovereign states have a responsibility to protect *their own citizens* from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states” (emphasis supplied). At 13, the report also notes: “Thinking

seems there is a move toward expanding the meaning of the term “its population” in the Outcome Document. For example, a report of the UN Secretary General (2013) declares that “‘populations’ refers not only to citizens or civilians but to all populations within State borders”.²⁰⁰ The movement from “its population” to “all populations within State borders” is ostensibly to ensure that states have responsibilities to protect foreigners as well. However, in view of the fact that the stateless Rohingyas are regarded as illegal residents/immigrants in Burma, their statelessness complicates the question of whether they may be properly regarded as Burma’s “own” population for the purpose of invoking any R2P.

Furthermore, historical evidence also suggests that the stateless genocide victims seldom have anywhere to run to. In other words, as Arendt aptly describes them, the stateless genocidal victims are often “undesirables” to most countries.²⁰¹ They are *undesirable* because most countries do not want them and would not offer them refuge, when they flee persecution. This, as shown in chapter two, is also because unlike other refugees who could be expelled to their country, the stateless cannot be repatriated to any country. Thus, on the whole, the statelessness of (potential) genocide victims like the Rohingyas (potentially) puts them in a worse position.

4.0 CONCLUSION

As discussed in the previous chapter, the effectiveness of the use of the right to nationality to remedy existing statelessness has been hampered by the vagueness and imprecision of its terms,

of sovereignty as responsibility, in a way that is being increasingly recognized in state practice, has a threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of *citizens* and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the *citizens* internally and to the international community through the UN.” (emphasis supplied); Stahn, *supra*, note 196, at 101: “Under the concept of responsibility to protect, matters affecting the life of the citizens and subjects of a state are no longer exclusively subject to the discretion of the domestic ruler but are perceived as issues of concern to the broader inter-national community”. See also Welsh, 2010, *supra*, note 196, at 416 – 17; Welsh, 2002 *supra*, note 198, at 493.

²⁰⁰ UNGA/SC, “Responsibility to protect: State responsibility and prevention, Report of the Secretary-General” A/67/929- S/2013/339, 9 July 2013, para. 5, online: Responsibility to Protect <<http://responsibilitytoprotect.org/UNSG%20Report%20on%20RtoP%20and%20State%20Responsibility%20and%20Prevention%281%29.pdf>>.

²⁰¹ Arendt, *supra*, note 1, at 283.

states overtly exercising their sovereignty by withholding consent for unambiguous provisions that create positive obligations to grant nationality, and the absence of effective monitoring or enforcement mechanisms. This has created a lot of confusion regarding the status of the right to nationality under international law, hence most literature adopt a cautious approach in their interpretation of the right to nationality, ranging from a “trend towards recognition”²⁰² to “fledgling human right”²⁰³ to a “doubt” as to what the right entails.²⁰⁴ The confusion has created a lacuna that accounts for the existence of stateless groups like the Rohingyas, Bidoons and the ‘Non-Citizens’ of Latvia.

Although there may be confusion regarding the status of the right to nationality, there is, however, no confusion as to the suffering that arises from failure to protect this right. In fact, Arendt does not seem to have exaggerated when she argued that the loss of right to nationality entails the loss of all human rights.²⁰⁵ This is because as shown above, despite the existence of several international human rights instruments which purport to be applicable to ‘everyone’, stateless persons like the Rohingyas are still an “anomaly” who do not fit smoothly into the legal or social life of their country of sojourn.²⁰⁶ They are indeed “defenceless beings, who have no clearly defined rights and live by virtue of good-will and tolerance”.²⁰⁷

From the above discussion of right to nationality as a *basic* human right, it is clear that the statelessness of stateless people deprives them of freedom of movement, right to work, right to vote and be voted for, access to civil service, right to education, right to social security, freedom from discrimination, and recognition as a person before the law. The inability of stateless people to possess these rights is enough justification to regard the protection of the right to nationality as

²⁰² Johannes M.M. Chan, “The Right to a Nationality as a Human Right; the Trend towards recognition” (1991) 12 Human Rights Law Journal 1 at 13.

²⁰³ *Van Vlymen v. Canada (Solicitor General)* (F.C.) [2005] 1 F.C.R. 617.

²⁰⁴ Serena Forlati, “Nationality as a Human Right” in Alessandra Annoni & Serena Forlati, eds., *The Changing Role of Nationality in International Law* (Abingdon, Oxon: Routledge, 2013), 18 at 20.

²⁰⁵ See note 1 and the accompanying text above.

²⁰⁶ United Nations, A Study of Statelessness E/1112/E/1112/Add.1 (August 1949), p.8, available online: Refworld <<http://www.refworld.org/pdfid/3ae68c2d0.pdf>>.

²⁰⁷ *Ibid*, at 9.

erga omnes obligation, on account of being a *basic* right referred to by the decision of the ICJ in the *Barcelona Traction* case.

Similarly, as shown above, lessons learned from the events preceding most genocidal incidents of the 20th century, suggest that denationalization could well be an ‘early warning’ or ‘step towards’ genocide. It has also been shown that the statelessness of people like the Rohingyas puts them in a more vulnerable position on the issue of genocide. Thus, protecting the right to nationality of vulnerable stateless people may serve to prevent genocide, and on this ground alone or in combination with the *basic* human rights argument, the protection of the right to nationality may also be regarded as an *erga omnes* obligation.

In view of previous discussion on the confusion surrounding the status of the right to nationality, one may raise questions about the impact of a duty to protect the right to nationality as an *erga omnes* obligation on this confusion. In other words, questions may arise regarding the extent to which protection of the right to nationality as *erga omnes* obligation may be used to remedy the vagueness and imprecision of the right, the use of state sovereignty to withhold consent, and the absence of effective enforcement or monitoring mechanisms. Although the conception of a duty to protect the right to nationality as *erga omnes* obligation does not *ipso facto* remove the challenges arising from the vague or imprecision of the right, the *erga omnes* conception of a duty to protect the right is useful in respect of state sovereignty and enforcement mechanism.

As noted above, Burma is not a party to most of the relevant international instruments relating to right to nationality while Kuwait made reservations to the relevant provisions. Thus, neither of them is ordinarily bound to observe international law provisions relating to right to nationality. By contrast, the conception of a duty to protect the right to nationality as *erga omnes* obligation will dispense with the requirement of states’ consent. As a result, Burma and Kuwait may still be regarded to be in breach of a binding international law obligation if they fail to respect the right to nationality of the Rohingyas and Bidoons respectively. The right will also not be affected by contrary local legislation and/or government policy.

Again as noted in previous chapters, one of the impacts of states' sovereignty on the right to nationality is the absence of effective enforcement and monitoring mechanism.²⁰⁸ A corollary of this impact is that states are generally unwilling to interfere in the nationality dispute of others and, even if they desire to do so, their ability to interfere is hampered by international law rules which require states to have *locus standi* in order to be able to maintain any action for alleged violations of human rights norms. By contrast, the conception of a duty to protect the right to nationality as *erga omnes* will empower all states to act on behalf of stateless people. This is because, as De Schutter aptly observed, "the effect of obligations being *erga omnes* concerns the question of standing: all states have a legal interest in using any available remedies in order to ensure that the obligations are complied with".²⁰⁹ Thus, if one accepts the proposition that the duty to protect the right to nationality is an *erga omnes* obligation, it will mean that all humanity, including states, NGOs, and individuals can employ all measures against any state that violates the rights.²¹⁰

²⁰⁸ See pages 70-72 above.

²⁰⁹ Oliver De Schutter, *International Human Rights Law: Cases, Materials, Commentary*, (Cambridge: Cambridge University Press, 2010), 92.

²¹⁰ *Ibid.*

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

It makes sense to say that a man has a fundamental right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence... So, if rights make sense at all, then the invasion of a relatively important right must be a very serious matter. It means treating a man as less than a man, or less worthy of concern than other men.¹

As seen from previous chapters, there are several international and regional instruments which provide for a right to nationality and also seek to ameliorate the harsh effects of statelessness. However, these instruments have not had much impact in reducing incidence of statelessness mainly because the principle of State sovereignty in relation to the grant or revocation of nationality still seems to hold sway. Thus, states still exercise much discretion on the issue of citizenship and the exercise of this discretion is virtually mutually incompatible with the very purport of a general right to nationality. The incompatibility of states sovereignty on nationality with the right is further strengthened by the vagueness and imprecision of the instruments relating to the right. It is also strengthened by the principle of international law which allows states to overtly exercise their sovereignty to withhold consent to any unambiguous provision that imposes a positive obligation on them to grant their nationality to potential stateless people or to accept as nationals groups they feel are not part of ‘them’, as well as the absence of effective monitoring or enforcement mechanisms.

The situation is worse where a country, for example Burma, is not party to the relevant international instruments dealing with nationality and statelessness. The effect of not being a party to the relevant instruments is that the country is not under any obligation to respect the ‘right to nationality’ of the stateless Rohingyas under international law – except, as discussed in chapters three and four, the right to nationality is seen as part of customary international law and/or where a duty to protect the right is an *erga omnes* obligation.

¹ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 199 [Dworkin].

The above mutually incompatible combination of states sovereignty and the right to nationality in international law creates a lacuna which allows the continued existence of stateless groups like the Rohingyas, Bidoons and the ‘Non-Citizens’ of Latvia in Burma, Kuwait and Latvia respectively. As a result of the lacuna, a state like Burma could by the application of its citizenship law validly exclude some groups from its nationality because they are not as “fair and soft, good looking as well [as ‘us’]” or because “they are as ugly as ogres”.² Thus, notwithstanding the modern concept of nationality which emphasizes the idea of individuals coming under the protection or jurisdiction of a given state, usually for the purpose of inter-state relations,³ the traditional concept of nationality which denotes being a part of a people who share some common characteristics,⁴ that is, a common ancestry, language, territory, religion, value, and culture still continue to hold sway today. Nationality is also seen as a form of identification and exclusion, hence the continued existence of stateless people like the Rohingyas and the Bidoons – in a world which recognizes a right to nationality.

Their continued existence exposes the inadequacy of the present state of international law to protect the right to nationality of stateless people. This inadequacy highlights the need for a robust approach to tackle the problem and undesirable effects of statelessness. The purpose of

² See a Letter from Ye Myint Aung, Consul General of Myanmar in Hong Kong, to heads of Mission, Consul Corps, Hong Kong and Macau SAR, February 9, 2009, suggesting a reason of rejecting the Rohingyas as Burmese citizens. Content of the letter is quoted in Human Rights Watch, “Perilous Plight: Burma’s Rohingya take to the Seas” (May 2009), 7.

³ Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* (New York: American University Graduate School, 1934) 6 – 7 [Seckler-Hudson]. See also Paul Weis, *Nationality and Statelessness in International Law* (Westport: Hyperion Press, 1979), 13 [Weis], Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law*, (Oxford: Oxford University Press, 2012), 43 [Kesby]; see also A.M.Boll, *Multiple Nationality and International Law* (Leiden: Martinus Nijhoff, 2007), 61 – 69; Ian Brownlie, ‘The Relations of Nationality in Public International Law’ (1963) 39 BYIL 284, 319.

⁴ Guido Zernatto & Alfonso G. Mistretta, “Nation: The History of a Word” (1944) 6 *The Review of Politics* 351; David Dudley Field, *Outlines of an International Code*, 2d ed (New York: Baker, Voorhis & Co, 1876), at 2; Pasquale Fiore, *Nouveau Droit International Public: Suivant Les Besoins de la Civilization Moderne*, translated by P. Pradier-Fodere (Paris: Auguste Durand & Pedone-Lauriel, 1868), at 118 – 119; Henry L. Bretton, *International Relations in the Nuclear Age: One World, Difficult to Manage* (Albany: State University of New York Press, 1986), at 5; Anthony D. Smith, “Ethnie and Nation in the Modern World” (1983) 14:2 *Millennium* 128; Michael Keating, *Plurinational Democracy* (Oxford: Oxford University Press, 2001), 6 – 7 [Keating].

this section is to examine some of the measures that may be taken to give effect to the right to nationality and tackle continued statelessness. The measures will be examined under two broad headings, namely, (a) changing the perception of (right to) nationality, and (b) remedial measures.

1.0 CHANGING THE PERCEPTION OF (RIGHT TO) NATIONALITY

The starting point of the robust approach, necessary to tackle continued statelessness, is to change the perception of nationality. As noted above, even in face of various international and regional instruments providing for a right to nationality, the concept of nationality still continues to be inextricably tied to the state. Hence existing literature and some judicial decisions still assert the principle of nationality being within the exclusive preserve of states – although some do have a caveat that states should exercise this sovereignty in compliance with their human rights obligations.⁵ It is submitted that this pro-states sovereignty-centered conception of nationality greatly diminishes the status of nationality as an independent enforceable human right in international law.

In view of the above, this thesis advocates a human rights-centered perception of nationality, and that statelessness should be seen in its true light, that is, as a violation of a human right rather than the undesirable consequence of the exercise of states sovereignty. In order to be more effective, the pro-human rights perception of nationality should include the factors discussed below.

1.1 Taking Rights and Suffering Seriously

The first aspect of changed perception necessary for a robust approach to tackle continued statelessness is to take everyone's right to nationality seriously, as well as the suffering that arises from failure to give effect to the right. Dworkin, as noted above, has argued that "fundamental" rights should be taken seriously in order to avoid treating a person as being "less

⁵ See pages 80 – 83 above.

than a man, or less worthy of concern than other men”.⁶ *Fundamental* right, according to him, is one which is “necessary” to protect a person’s dignity or his ability to be treated equally in relation to others.⁷ As already stated, although the status of the right to nationality in itself may be unclear, confusing or debatable, there is hardly any confusion regarding the effect of failure to protect this right. The failure to protect results in a situation where a class of people have lost “all human rights”⁸ and are therefore not entitled to other universally acclaimed rights, such as, freedom of movement, right to work, right to vote and be voted for, access to civil service, right to education, right to social security, freedom against discrimination, and recognition as a person before the law.⁹ The loss of these human rights ostensibly makes the stateless people unequal and “less worthy” than others. Hence, the right to nationality should be taken seriously, not only because it is a *right* in itself, but also because it is necessary to protect a person’s dignity and his ability to be treated equally in relation to other rights.

As discussed in chapter one, Baxi has also argued that *taking rights seriously* requires *taking suffering seriously*.¹⁰ He used the idea of a *taking suffering seriously* to advocate a liberal interpretation of statutory provisions, in this case international instruments, with a strong bias in favour of human rights.¹¹ Felice has also used a similar idea to advocate the recognition of group suffering and protection of collective rights, that is, the need to protect an entire vulnerable group, so that more individuals within the group will be protected.¹² The combination of Baxi and Felice’s positions postulates that *taking rights seriously* requires *taking [group] suffering seriously*. As seen in previous chapters, the statelessness of people, like the Burmese Rohingyas and Kuwaiti Bidoons, not only deprived them of virtually all human rights; it also makes them vulnerable to genocide and other crimes against humanity. This deprivation or vulnerability necessitates taking their suffering seriously. *Taking the suffering of stateless people seriously*

⁶ Dworkin, *supra*, note 1, at 199.

⁷ *Ibid.*

⁸ See Hannah Arendt, *The Origins of Totalitarianism* (Cleveland: The World, 1958), 299 [Arendt].

⁹ See pages 98 – 114 above.

¹⁰ Baxi, Upendra, “Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India” (1985) 4 Third World Legal Studies 107 at 116 – 119 [Baxi].

¹¹ *Ibid.*

¹² William F. Felice, “The Case for Collective Human Rights: The Reality of Group Suffering” (1996) 10 Ethics and International Affairs 47 [Felice].

requires empathizing with them and taking all necessary steps to ameliorate the suffering that arise from their inability to enjoy the right to nationality.

1.2 Invoking the Principle of *Erga Omnes* Obligations

A corollary to taking the right to nationality seriously is the recognition of a duty to protect the right as an *erga omnes* obligation. This is the second aspect of changed perception necessary for effectively tackling the continued statelessness of stateless people like the Rohingyas, Bidoons and the Non-citizens of Latvia.

As noted previously, one of the major challenges besetting the right to nationality is the vagueness and imprecision of its provisions, that is, the failure of the relevant instruments to specify which nationality every person is entitled to under the instrument. This is in addition to the negative impact of states' sovereignty on the right to nationality that has resulted in the statelessness of groups like the Rohingyas, Bidoons and Non-citizens of Latvia. In other words, a pro-human rights perception of nationality has to tackle the stark reality of Burma not being a party to most of the relevant instruments, Kuwait refusing to accept any obligation by entering reservations to the operative provisions, and Latvia using language and previous employment to exclude the 'Non-citizens' from its nationality. As noted in previous chapters, these states' actions are ordinarily valid exercises of states sovereignty, but they also have adverse impacts on the right to nationality and have resulted in the suffering of the affected stateless people.

One of the ways of reducing, if not absolutely remedying, the above negative impact of states sovereignty is to recognize and treat the protection of right to nationality as an *erga omnes* obligation. As shown in chapter four, the right to nationality is a *basic* right, as a result of its relationship with the enjoyment of other human rights. It is also closely linked with duty to prevent genocide. These two characteristics of the right to nationality fall within the examples of *erga omnes* obligations given by the International Court of Justice in the *Barcelona Traction case*.¹³

¹³ *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, I.C.J. Reports 1970, 32 at 33 – 34.

One main advantage of recognizing the protection of right to nationality as an *erga omnes* obligation is that, apart from dealing with adverse exercise of states sovereignty, it gives all humanity a legal interest in the protection of the right to nationality. In other words, an *erga omnes* approach to protecting the right allows other states, NGOs, individuals, and others to take steps to ensure that states, for example Burma and Kuwait, respect the right to nationality of stateless people. Some of the steps are discussed below.

2.0 REMEDIAL MEASURES

The remedial measures are necessary steps to be taken to ameliorate the suffering of stateless people. This includes both legal and socio-political measures to give effect to the right to nationality of stateless people. This is in tandem with existing literature which also contain diverse suggestions for dealing with the suffering arising from statelessness. For example, the Secretary-General's 1949 *Study of Statelessness*¹⁴ suggested the adoption of both legal and socio-political measures to improve of the status of stateless persons and to take steps towards the elimination of future statelessness as means of dealing with the anomaly of statelessness.¹⁵ Weissbrodt suggested the adoption of “preemptive”, “minimizing” and “naturalizing” methods of dealing with the problem.¹⁶ The legal and socio-political measures would include a wide range of legislative, judicial, diplomatic, and other measures that may be employed to give effect to the right to nationality of stateless people.

However, the necessary steps taken to ameliorate the suffering of stateless people must take into account the unique sets of facts surrounding the various stateless groups. This is because, as seen from previous chapters, even though the Rohingyas, Bidoons and Non-citizens of Latvia share statelessness in common, each of them occupies peculiar situations in their respective countries.

¹⁴ United Nations Economic and Social Council, A Study of Statelessness, E/1112;E/1112/Add.1 (August 1949), online: Refworld <<http://www.refworld.org/pdfid/3ae68c2d0.pdf>> [*Study of Statelessness*].

¹⁵ *Ibid*, at 10.

¹⁶ David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford: Oxford University Press, 2008), 102 – 103 [*Weissbrodt*].

For example, the Bidoons and the Rohingyas are regarded as illegal immigrants in Kuwait and Burma respectively, whereas the ‘Non-Citizens’ of Latvia are lawful residents in Latvia and do, in fact, have some basic rights. Second, Latvia, being a party to most of the relevant instruments on right to nationality and prevention of statelessness, is ordinarily bound by their provisions, unlike both Kuwait and Burma. Also, the stateless ‘Non-citizens’ of Latvia do not pass their statelessness to their children because children born after Latvia’s independence (August 21, 1991) to parents who are both non-citizens are entitled to Latvian citizenship upon request of the parents by virtue of section 3(1) of Latvia Citizenship law, which itself is in accordance with Latvia’s obligation under the Convention on the Reduction of Statelessness (CRS).¹⁷ Some of the remedial measures that may be adopted are discussed below.

2.1 Necessary Clarification through a UN Instrument

As noted previously, one of the major challenges besetting the right to nationality is the vagueness and imprecision of its provisions. One way of obviating this challenge is the adoption of an international (supplementary) instrument to clear this ambiguity. The aim of the instrument is to identify the state with the duty to grant nationality, in any given circumstance. One way of achieving this aim is by incorporating, what some authors have described as, the doctrine of “substantial connection” or “genuine and effective link”.¹⁸

The origin of the doctrine of effective link in relation to nationality is generally credited to the decision of the International Court of Justice (ICJ) in *Nottebohm Case (Liechtenstein v. Guatemala)*.¹⁹ In the case, Liechtenstein claimed restitution and compensation on the ground that the Government of Guatemala had “acted towards the person and property of Mr. Friedrich

¹⁷ (1961) U.N.T.S. Vol. 989, 175.

¹⁸ See for example, Jeffrey L. Blackman, “State Successions and Statelessness; The Emerging Right to an Effective Nationality under International Law” (1998) 19 Mich J Int’l L 1141 [Blackman]; Robert D. Sloane, “Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality” (2009) 50:1 Harvard International Law Journal 1 [Sloane]; Craig Forcese, “The Capacity to Protect: Diplomatic Protection of Dual Nationals in the ‘War on Terror’” (2006) 17:2 EJIL 369 [Forcese].

¹⁹ *Nottebohm Case (Liechtenstein v. Guatemala)*, Second Phase (1955) I.C.J. Reports 4.

Nottebohm, a [naturalized] citizen of Liechtenstein, in a manner contrary to international law”.²⁰ The issue turned on whether the naturalization was effective and whether Nottebohm had real and effective links with Liechtenstein, the basis upon which Liechtenstein could exercise diplomatic protection on his behalf. The Court ruled the claim inadmissible because the “sole aim” of the naturalization was “coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life, or of assuming its obligations” and for this reason “Guatemala is under no obligation to recognize a nationality granted in such circumstances.”²¹ The court also held:

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.²²

The *Nottebohm* decision has come under severe scholarly criticism mainly because of its suggestion that recognition of the process of citizenship by naturalization by some other states was necessary for the naturalization to be effective.²³ Nonetheless, some literature have embraced the doctrine of effective link established in the case and have used it in their argument in support of the right to nationality and duty to avoid statelessness, especially in relation to state succession. For example, Brownlie has argued that successor states are obliged to confer nationality on nationals of their predecessor state who have effective links to the successor states’ territory.²⁴ The Organization for Security and Co-operation in Europe Parliamentary Assembly has issued a resolution which “urges that, upon a change in sovereignty, all persons who have a genuine and effective link with a new State should acquire the citizenship of that

²⁰ *Ibid*, at 12.

²¹ *Ibid*, at 26.

²² *Ibid*, at 22.

²³ See for example, Sloane, *supra*, note 18, at 11 – 24; Blackman, *supra*, note 18, at 1158 – 1159.

²⁴ Ian Brownlie, “The Relations of Nationality in Public International Law” (1963) 39 Brit Y.B Int’l L 284, at 324 – 325.

State”.²⁵ The Office of the United Nations High Commissioner for Refugees has also issued a legal opinion which declared “that residence and the genuine effective link [are] the key factors for determination of nationality in the context of State succession”.²⁶

While some other literature do not make direct reference to the doctrine, they nonetheless embrace some aspects of the doctrine, especially in relation to territory, for the purpose of determining which state has the duty to confer nationality in relation to state succession. For example, the draft Articles on Nationality of Natural Persons in relation to Succession of States²⁷ provides that “every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned”²⁸ and “persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession”.²⁹ Inspired by the draft Articles, the Council of Europe adopted the Convention on the Avoidance of Statelessness in Relation to State Succession.³⁰ The Convention was adopted by the Committee of Ministers on 15 March 2006 and it entered into force on 1 May 2009.³¹ Article 2 of the Convention provides that “everyone who, at the time of the State succession, had the nationality of the predecessor State and who has or would become stateless as a result of the State succession has the right to

²⁵ Blackman, *supra*, note 18, at 1164, citing Erika B. Schlager, “The Rights to Have Rights: Citizenship in Newly Independent OSCE Countries” (1997) 8 Helsinki Monitor 19 at 23.

²⁶ Office of the U.N. High Commissioner for Refugees, *The Czech and Slovak Citizenship Laws and the Problem of Statelessness* (February 1996), 12, quoted in Blackman, *supra*, note 18, 1164.

²⁷ Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries (1999) Text adopted by the International Law Commission at its fifty-first session, in 1999, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (at para. 48). The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 1999, vol. II, Part Two.

²⁸ *Ibid*, Article 1.

²⁹ *Ibid*, Article 5.

³⁰ Council of Europe, Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession, 15 March 2006, CETS 200, available at: <http://www.refworld.org/docid/4444c8584.html> [accessed 18 September 2013].

³¹ *Ibid*. However, only 6 countries, namely Austria, Hungary, Moldova, Montenegro, Netherland and Norway, have ratified the Convention. Germany and Ukraine have signed but not yet ratified it. Status update as at 18 September 2013 available online: COE <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=200&CM=8&CL=ENG>>.

the nationality of a State concerned, in accordance with the following articles”. Under Article 3, states are obliged to “take all appropriate measures to prevent persons who, at the time of the State succession, had the nationality of the predecessor State, from becoming stateless as a result of the succession”. Article 4 prohibits discrimination on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. More importantly, Article 5 sets out the responsibility of the successor state, it provides that:

1. A successor State shall grant its nationality to persons who, at the time of the State succession, had the nationality of the predecessor State, and who have or would become stateless as a result of the State succession if at that time:
 - a. they were habitually resident in the territory which has become territory of the successor State, or
 - b. they were not habitually resident in any State concerned but had an appropriate connection with the successor State.
2. For the purpose of paragraph 1, sub-paragraph b, an appropriate connection includes *inter alia*:
 - a. a legal bond to a territorial unit of a predecessor State which has become territory of the successor State;
 - b. birth on the territory which has become territory of the successor State;
 - c. last habitual residence on the territory of the predecessor State which has become territory of the successor State.

The above provisions are ostensibly in tandem with the doctrine of genuine and effective link and they will reduce, if not absolutely remove, any ambiguity regarding which nationality stateless persons in such circumstances are entitled to. Thus, the provisions are a suitable model for any proposed UN sponsored instrument which may be adopted for the purpose of specifying the nationality which stateless persons, or indeed everyone, is entitled to. As Weissbrodt succinctly puts it:

One way to ensure that stateless persons realize their right to a nationality... is through the doctrine of genuine and effective link. According to this doctrine, a person should be eligible to receive citizenship from states with which she or he has a substantial connection or a genuine and effective link... A substantial link or connection to a state can be forged by, for example, long term habitation in a state without a more substantial link to another state, descent from a state's citizen, birth within a state territory, or citizenship in a country's former federal state.

The doctrine of genuine and effective link is a viable solution to the problem of statelessness because it is generally ‘not difficult to determine to which state an individual has genuine effective link for the purpose of nationality decisions.’³²

2.1.1 A UN Declaration or Convention?

As seen in previous chapters, attempts to tackle or eliminate statelessness through the conception of a right to nationality have been largely unsuccessful due to the overt use of state sovereignty to withhold consent to binding instruments relating to the right to nationality. Hence very few states have ratified most of the relevant international instruments.³³ This necessitates raising questions regarding the nature of the proposed UN instrument that would incorporate the above-mentioned doctrine of effective link: should it be a Declaration or (binding) Convention?

As already noted, unlike treaties (conventions) which are binding on state parties, UN Declarations are generally not binding on states.³⁴ Thus a binding instrument (convention) would ordinarily be preferable to a usually non-binding Declaration for the purpose of incorporating the doctrine of effective link to identify the duty-bearer in respect of a right to nationality. However, judging from the outcome of review of states’ attitude to international/regional conventions with provisions relating to right to nationality and reduction or elimination of statelessness in previous chapters,³⁵ it will be difficult (but not impossible) to achieve the desired aim of incorporating effective link through a binding convention – since there is a high probability that the proposed convention would suffer the same fate as the existing ones, that is, it may be ratified by very few states.

³² Weissbrodt, *supra*, note 16, at 107 – 108 (footnotes omitted).

³³ See pages 64 – 70 above.

³⁴ See generally, See Malcom N. Shaw, *International Law*, 6th ed, (Cambridge: Cambridge University Press, 2008), 93ff; Gregory J. Kerwin “The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts” (1983) *Duke Law Journal* 876 at 877 – 880 [Kerwin]; Obed Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (The Hague: Martinus Nijhoff, 1966) 19 – 25; Stephen M. Schwebel, “The Effect of Resolutions of the U.N. General Assembly on Customary International Law” (1979) 73 *Proc. Am. Soc’y Int’l L* 301 – 309; Oscar Schachter, “The Evolving International Law of Development” (1976) 15:1 *Colum. J. of Transnat’l L.* 1 at 4 – 6.

³⁵ See pages 35 – 38, 59 – 67 for the review of proceedings of the drafting committees of the relevant international instruments.

In order to avoid the usual wrangling that bedeviled the adoption and ratification of international instruments on right to nationality,³⁶ a UN Declaration to incorporate the doctrine of effective link appears to be the most realistic option. This is because the process leading to the adoption of UN Declarations is generally not as cumbersome and complicated as that of binding instruments, due to a variety of reasons. First, UN Declarations relating to human rights generally take effects when the draft is approved by a simple majority of states at the General Assembly,³⁷ whereas, in the case of a draft convention, the adoption of a resolution of the General Assembly is usually simply a preliminary step, as the draft instrument must be ratified by the requisite number of states (governments) in order to become effective and binding on states parties.³⁸ Second, it is much easier to obtain a UN Declaration because experience suggests that, when faced with a non-binding draft UN instrument relating to human rights which they do not approve of, most states usually abstain from voting instead of casting opposing votes.³⁹ For example, a review of the UDHR proceedings reveals that the Soviet Union, South Africa, Saudi Arabia, Poland, amongst others, opposed various aspects of the drafts of the UDHR. However, they abstained from voting on the UDHR instead of voting against it. Hence the UDHR was passed with 48 votes, 0 against and 8 abstentions.⁴⁰ Third, even though UN Declarations are generally non-binding, they do have significant influence the formation of customary international law.⁴¹ According to Joyner, they “may stimulate action towards, or provide an incipient step for the

³⁶ See pages 60 – 63 above for examples of such wrangling.

³⁷ Charter of the United Nations, 26 June 1945, Can TS 945 No 7, Article 18(3).

³⁸ See generally Shaw, *supra*, note 34, at 907 – 913; United Nations, *Final Clauses of Multilateral Treaties: Handbook* (2003), 1 – 10, online: UN Treaty <<http://treaties.un.org/doc/source/publications/FC/English.pdf>>.

³⁹ See Gerald Fitzmaurice, “The Future of Public International Law and of the International Legal System in the Circumstances of Today” (1976) 5:1 *International Relations* 949 at 954 [Fitzmaurice]: observed that “many Assembly resolutions... have been acceptable, or at least tolerable, precisely because they were not binding in law. Had it been otherwise, it is more than doubtful whether they would have secured the majority (usually two-thirds) necessary for adoption, and many States which may at present abstain on such resolutions would be obliged to vote against them.”

⁴⁰ See Yearbook of the United Nations (1948-1949), 524 – 535; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999), 21 – 28 [Morsink].

⁴¹ See generally, Kerwin, *supra*, note 34, at 877 – 880.

genesis of customary international law”.⁴² They may also form part of evidence that nations have created a principle of customary international law.⁴³

2.2 Establish a “World Court of Human Rights” or Expand the Jurisdiction of the International Court of Justice (ICJ)?

As previously observed, most relevant instruments relating to right to a nationality do not have effective enforcement and monitoring mechanisms; they either do not contain any enforcement or monitoring provisions at all, or the few that contain monitoring or enforcement procedures limit the parties entitled to bring any action to enforce the provisions of the instruments to states. By contrast, most regional human rights instruments, such as the European, American and African human rights conventions, establish tribunals with jurisdictions to entertain application from individuals. However, Asia does not have any human right instruments while the Arab world, though having a human right instrument, is yet to set up a monitoring agency. Hence, neither the Rohingyas nor the Bidoons have any international/regional forums to enforce their right to nationality. As a way to remedy situations of absence of international forum to ventilate grievances, some authors have advocated the establishment of a “World Court of Human Rights” or an “International Court of Human Rights”.⁴⁴

⁴² Christopher C. Joyner “U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation” (1981) 11 Cal. W. Int'l L.J. 445 at 459.

⁴³ Kerwin, *supra*, note 34, 880 n. 26.

⁴⁴ See generally, Arthur J. Goldberg, “The Need for a World Court of Human Rights” (1965) 11 Howard L.J. 621 [*Goldberg*]; Manfred Nowak, “The Need for a World Court of Human Rights” (2007) 7:1 Human Rights Law Review 251 – 259 [*Nowak, 2007*]; Geir Ulfstein, “Do We Need a World Court of Human Rights?” in Ola Engdahl & Pål Wrange, eds., *Law at War: The Law as it was and the Law as it Should Be* (The Hague: Martinus Nijhoff, 2008) 261, at 272 [*Ulfstein*]; Julia Kozma, Manfred Nowak & Martin Scheinin, “A World Court of Human Rights: Consolidated statute and commentary” (Vienna: Neuer Wissenschaftlicher Verlag, 2010) 29ff [*Kozma, Nowak & Scheinin*]; Martin Scheinin, “Towards a World Court of Human Rights”, Swiss Initiative to commemorate the 60th anniversary of the UDHR Protecting Dignity: An Agenda for Human Rights (2009), 7 – 17, online: UDHR60 <http://www.udhr60.ch/report/hrCourt_scheinin0609.pdf>; Manfred Nowak & Julia Kozma, “A World Court of Human Rights” Swiss Initiative to commemorate the 60th anniversary of the UDHR Protecting Dignity: An Agenda for Human Rights (2009), 13 – 28, online: UDHR60

The idea of a world court of human rights was first mooted in 1947 by the Australian government, during the negotiations at the Paris Peace Conference of 1946.⁴⁵ Led by H.V. Evatt, Australian Deputy Prime Minister, the Australian delegation proposed the creation of a “Court of Civic Rights” to hear complaints and enforce the human rights clauses in the peace agreements.⁴⁶ One of the grounds for their proposal was that where there is a right there ought to be a judicial remedy.⁴⁷ According to Devereux,

Evatt and other Australian delegates rejected the utility of political remedies (such as General Assembly discussion) to deal with human rights abuses...Negotiations between parties (particularly state parties) was also derided as providing second-class justice...Diplomatic redress was insufficient...National governments alone could not be trusted to protect human rights since individuals would be subject to the arbitrary will of a majority. A court, on the other hand, would not only serve to give individuals remedies, but would serve as a deterrent to would be perpetrators of abuse.⁴⁸

About two decades later (1965), a former Justice of the US Supreme Court, Arthur Goldberg, argued that the “time is overdue” “for the establishment of an International Court of Human Rights to enforce the rights” set out in the Universal Declaration of Human Rights (UDHR) as guaranteed by a binding treaty.⁴⁹ Since then, more authors have argued in support of the establishment of such an international or world court for human rights.⁵⁰ Some authors have even prepared what they called the “[Draft] Statute of the World Court of Human Rights”.⁵¹ The draft Statute states that the court “shall be a permanent institution and shall have power to decide in a final and binding manner on all complaints about alleged human rights violations brought before

<<http://www.udhr60.ch/report/hrCourt-Nowak0609.pdf>> [Nowak & Kozma]; Mark Gibney, *International Human Rights Law - Returning to Universal Principles* (Lanham: Rowman & Littlefield, 2008), 121 – 123 [Gibney].

⁴⁵ Annemarie Devereux, *Australia and the birth of the International Bill of Human Rights, 1946-1966* (Sydney: Federation Press, 2005), 180 [Devereux]; Manfred Nowak, “A New World Court of Human Rights: A Role for International Humanitarian Law?” in Robert Kolb & Gloria Gaggioli, eds., *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Edward Elgar, 2013) 531 at 532 [Nowak 2013].

⁴⁶ Devereux, *supra*, note 45, 180.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, at 180-181.

⁴⁹ Goldberg, *supra*, note 44, at 621.

⁵⁰ See note 44 and the accompanying text above.

⁵¹ Kozma, Nowak & Scheinin, *supra*, note 44, at 8 – 28.

it”.⁵² It lists the Convention on the Status of Stateless Person, International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child as part of the “applicable law’ which the court has jurisdiction to enforce.⁵³ However copiously missing from the list are the Convention on the Reduction of Statelessness and the Convention on the Nationality of Married Women. According to the draft, the court may receive complaints from any person, non-governmental organization, groups of individuals claiming to be the victim of violation of any human right provided in any human rights treaty to which the respective state is a party.⁵⁴

Some authors have advanced reasons for the desirability of such international human rights court. Nowak, for example, argues that it will ensure the right of victims of human rights violations to an effective remedy and to adequate reparation for the harms suffered, and it will also offer the opportunity to address a number of unsolved contemporary human rights problems, such as the accountability of non-State actors.⁵⁵ He also contends that the creation of the World Court can be achieved in a smooth manner without any treaty amendment and without abolishing the present treaty monitoring bodies, and that the court would become the major counter-part of the Human Rights Council within the treaty system.⁵⁶ Scheinin suggests that the absence of such international human rights court allows states to evade their human rights obligations.⁵⁷ Ulfstein also argues that the establishment of such a court would help overcome the “present weaknesses of the supervisory system” of human rights in international law and also “strengthen the effectiveness of individual (and possibly interstate) complaints”.⁵⁸

However, some authors have dismissed the idea of a world court as “utopian” which “will never be realized in practice”.⁵⁹ Trechsel extensively reviewed the arguments in favour of the

⁵² *Ibid*, Article 1.

⁵³ *Ibid*, Article 5.

⁵⁴ *Ibid*, Article 7.

⁵⁵ Nowak 2007, *supra*, note 44, at 259.

⁵⁶ *Ibid*.

⁵⁷ Scheinin, *supra*, note 44, at 8.

⁵⁸ Ulfstein, *supra*, note 44, at 262.

⁵⁹ See Nowak & Kozma, *supra*, note 44, at 14.

establishment of a world court of human rights, but nonetheless concludes that “[r]ealistically speaking, the creation of a world court for human rights is, at the present time, neither desirable, nor necessary, nor probable.”⁶⁰ He raised crucial questions regarding the status of the proposed world court using three different models, namely, (a) a sibling to the ICJ (“Sibling Model”, (b) a court in its own right like the International Criminal Court (“ICC-Model”), and (c) a court as the top part of a world-wide judicial pyramid (“Pyramid Model”).⁶¹ He also raised valid questions regarding the competencies of the court with reference to (a) “*ratione personae*” (who can apply to the court),⁶² (b) “*ratione materiae*” (what is meant by ‘human right’),⁶³ (c) “*ratione loci*” (the question of *locus standi*),⁶⁴ and (d) “*ratione temporis*” (the questing of dealing with ‘continuing situation’).⁶⁵

As previously noted, the draft Statute provides for individual and group complaints, from persons claiming to be victims of alleged human right violations. This provision however strengthens the argument in favour of the impracticability or utopian nature of the proposed court, if the experience of regional human rights courts is anything to go by. For example, the European Convention on Human Rights allows individual complaints in respect of alleged human rights violations,⁶⁶ and this may have allowed the European Court of Human Rights (ECHR) to be overwhelmed with a high volume of applications, such that 151,600 applications were pending before the ECHR by the end of 2011 while 128,000 applications were pending at the end of 2012.⁶⁷ Allowing individual applications to the proposed world court would most certainly overwhelm the court with high volumes of application and essentially defeat the essence of the proposed world court. In addition, there are also valid questions regarding the ultimate status of the court: would it be an ultimate court of appeal? That is, would an appeal lie to the court from the Inter-American Court of Human Right, ECHR or even the International

⁶⁰ Stefan Trechsel, “A World Court for Human Rights?” (2004) 1 Northwestern University Journal of International Human Rights 3 at para. 70 [Trechsel].

⁶¹ *Ibid*, at paras. 20 – 25.

⁶² *Ibid*, paras. 26 – 39.

⁶³ *Ibid*, paras. 40 – 42.

⁶⁴ *Ibid*, para. 43.

⁶⁵ *Ibid*, paras. 44 – 45.

⁶⁶ ETS 5, 213 UNTS 221; Article 11.

⁶⁷ See ECHR, *Analysis of Statistics 2012* (January 2013), online ECHR <www.echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf>.

Criminal Court (ICC)? These questions put the desirability and practicability of the court in doubt.

While it may be impracticable to establish a world court of human rights, it is very practicable, and even much more desirable, to expand the jurisdiction of the present ICJ – so that it can be able to entertain human rights enforcement applications brought in a representative capacity on behalf of stateless groups like the Rohingyas. This expansion is necessary because only states are presently allowed to initiate or defend any action before the ICJ.⁶⁸ Thus, there is presently no room for individual or representative complaints before the ICJ, and this limited jurisdiction as to parties has resulted in the court making a very limited impact on the development of international human rights law jurisprudence.⁶⁹

⁶⁸ Article 34 of the Statute of the International Court of Justice. See also Shaw, *supra*, note 34, at 1072.

⁶⁹ There are some ICJ cases that border on human rights, such as: *the Barcelona Traction*, *supra*, note 13 – established the principle of human rights as *obligation erga omnes*; the *South West Africa, Namibia and Western Sahara cases* (South West Africa, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16; Western Sahara, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12) – all dealt with the concept of self-determination. However most of the cases are brought by states on behalf of their respective citizens and the ICJ, in dealing with such cases, usually considered the human rights issues from the perspective of “diplomatic protection” rather than human rights violations *simpliciter*. See for example, the *Tehran Hostage case (Case Concerning United States Diplomats and Consular Staff in Tehran (United States of America v. Iran))* (1980) ICJ Rep 3) – case dealt with American diplomats that were taken hostage and held for 444 days; *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 ICJ REP. 168 – a case brought by Uganda to complain of the maltreatment by Congolese forces of Ugandan diplomats and certain other persons who lacked diplomatic status; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (2011) 50 ILM 37 – a case brought by the Republic of Guinea against the Democratic Republic of the Congo (DRC) on behalf of its national, Ahmadou Sadio Diallo, a businessman whom the DRC had arrested and detained more than once, and eventually expelled. For further review of the impact of the ICJ on human rights jurisprudence see generally; John R. Crook “The International Court of Justice and Human Rights” (2004) 1 Nw. J. Int'l Hum. Rts. 1; Bruno Simma, Mainstreaming Human Rights: The Contribution of the International Court of Justice (2012) 3:1 Journal of International Dispute Settlement 7; Sandy Ghandhi, “Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case” (2011) 11:3 Human Rights Law Review 527; Rosalyn Higgins, “Human Rights in the International Court of Justice” (2007) 20 Leiden Journal of International Law 745; Gentian Zyberi, “The International Court of

In order to avoid overwhelming the ICJ with high volumes of applications, potentially much more than the regional ECHR currently has to deal with, it is necessary to restrict the proposed expanded the jurisdiction of the ICJ to accommodate only representative actions brought on behalf of stateless people, and specifically for an alleged violation of their right to nationality. Such alleged violation of the right to nationality must be on a wide scale with some racial or ethnic undertone, that is, it involves denationalization (or exclusion from nationality) of some particular ethnic groups. The action must be brought on behalf of the affected ethnic groups, such as the Rohingyas and Bidoons, as a whole so that the issue of their entitlement to the nationality of the alleged violator country may be resolved once and for all. As observed above, the perception of the protection of the right to nationality as *erga omnes* obligation allows anyone, including other states, to bring this action on behalf of the Rohingyas and Bidoons against Burma and Kuwait respectively.

2.2.1 Expansive and Liberal Interpretation of Relevant Instruments

In exercising the proposed expanded jurisdiction, it is necessary for the ICJ to take the right to a nationality, as well as the suffering that arise from any failure to respect the right, seriously. Drawing from Dworkin, Baxi and Felice above,⁷⁰ taking the rights and suffering of stateless people seriously would mean that the ICJ, when faced with the existing previously-discussed vague and imprecise provisions of relevant international human rights instruments on the right to nationality, will adopt the expansive and liberal method of interpretation adopted by the Indian Supreme Court when dealing with enforceability of socio-economic rights (ESRs) under the Indian Constitution.⁷¹ The Indian Constitution enumerates some ESRs in the Directive Principles of State Policy⁷² which by the same Constitution “shall not be enforceable by any court”.⁷³ Arguably, the Constitution *prima facie* renders the ESRs unenforceable in court. However, an examination of some of the decisions of the Indian Supreme Court reveals that the Court, by

Justice and Applied Forms of Reparation for International Human Rights and Humanitarian Law Violations” (2011) 7:1 Utrecht Law Review 204.

⁷⁰ See notes 8 – 12 and the accompanying text above.

⁷¹ Constitution of India, 1950.

⁷² *Ibid*, Chapter IV.

⁷³ *Ibid*, Article 37.

adopting a broad definition to the right to life under the Constitution, has rendered ESRs enforceable in India. One of such cases is the case of *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors*,⁷⁴ where the Supreme Court held thus:

“But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings.”⁷⁵

The definition of the ‘right to life’ was further extended in the latter case of *Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors*,⁷⁶ where the Supreme Court, while considering whether forcible eviction of pavement and slum dwellers and removal of their hutments deprives them of their means of livelihood and consequently right to life, held thus:

“...the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live... must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life.”⁷⁷

⁷⁴ *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi & Ors* (1981) 2 SCR 516 (India).

⁷⁵ *Ibid*, at 530 – 531.

⁷⁶ *Olga Tellis & Ors v. Bombay Municipal Council* [1985] 2 Supp. SCR 51 (India).

⁷⁷ *Ibid*, at 80.

In view of the above, it is absolutely necessary for the ICJ to adopt such a liberal attitude in respect of the right to nationality in order to give effect to the right to nationality of stateless people.

2.2.2 Invoke Principle of *Ubi Jus Ibi Remedium*

Taking rights and suffering seriously, as well as the adoption of a liberal attitude to interpretation, may also necessitate the invocation of the principle of *ubi jus ibi remedium* (“where there is a right, there is a remedy”) in respect of the right to a nationality. As noted above, one of the reasons some have advocated for the establishment of a world court of human right is to give effect to the principle of *ubi jus ibi remedium*. It is submitted that the principle can still be invoked by virtue of Article 38 of the ICJ Statute which empowers the court to apply “the general principles of law recognized by civilised nations” as part of the source of international law. This provision allows the court to apply “certain common themes that run through many different legal orders”.⁷⁸ Consequently the court has applied common law and equitable principles relating to *res judicata*,⁷⁹ circumstantial evidence,⁸⁰ estoppel,⁸¹ amongst others.

Although a review of some decisions of international tribunals suggests that the principle of *ubi jus ibi remedium* have not been directly invoked, recognition of this principle may be inferred from the *Chorzów Factory* case where the PCIJ declared that “it is a general conception of law that every violation of an engagement involves an obligation to make reparation”.⁸² Similarly, in

⁷⁸ Shaw, *supra*, note 34, at 98.

⁷⁹ See *German Interests in Polish Upper Silesia (Germ. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7, 5 at 42; *Free Zones of Upper Savoy and District of Gex (Fr. v. Switz.)*, 1932 P.C.I.J. (ser. A/B) No. 46, 97 at 167; *Effect of awards of compensation made by the U. N. Administrative Tribunal, Advisory Opinion* (1954) ICJ Rep 47 at 53; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (2007) ICJ Rep 43, para. 113.

⁸⁰ The *Corfu Channel* case (1949) ICJ Rep 245 at 248.

⁸¹ *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment (1962) ICJ Rep 6, at 23, 31 and 32; *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections (1998) ICJ Rep 275, at 303.

⁸² *Factory at Chorzow (Germany v. Poland)*, 1928 PCIJ, Series A, No. 17, 29 at 36.

2005 the UN General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁸³ The resolution affirms the *ubi jus* principle in respect of victims of “gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity”.⁸⁴ The foregoing supports the proposition that the ICJ, and in fact any court, can validly invoke the *ubi jus* principle to remedy the otherwise vague and imprecise right to nationality, if it takes the suffering of stateless people seriously.

2.3 Pre-emptive Measures

As the title suggests, pre-emptive measures are steps taken to stop statelessness before it develops. There have been several attempts at such measure. For example, there is the recommendation by the 1949 UN report which states that (a) every child must receive a nationality at birth,⁸⁵ and (b) no person should lose his/her nationality unless he/she has acquired a new one.⁸⁶ Article 7 of the Convention on the Rights of the Child also enjoins states to grant nationality at birth to all children born in their territory ‘in particular where the child would otherwise be stateless’.⁸⁷ Similarly under Article 1 of the CRS, contracting States are obliged to grant nationality to any person born in its territory who would otherwise be stateless.

However, as discussed in previous chapters, while the efficacy of Article 7 of the CRC has been hampered by vagueness and imprecision of its provisions in failing to provide for *which* nationality the child is entitled to, Article 1 of the CRS has also suffered due to lack of ratification by most states. The failure of the above provisions necessitates the adoption of some socio-political measures to counter-balance the otherwise legitimate exercise of state sovereignty. In line with the above-mentioned *erga omnes* perception of the protection of the right to nationality, any state may take these measures, which may involve diplomatic, economic

⁸³ A/RES/60/147, 21 March 2006.

⁸⁴ *Ibid*, at 3.

⁸⁵ Study of Statelessness, *supra*, note 10, at 135 – 138.

⁸⁶ *Ibid*, 138-140. See also Weissbrodt, *supra*, 102 – 103.

⁸⁷ (1989) U.N.T.S. Vol. 1577, 3.

and other pressures sufficient to ensure that states do not insist on exercising their perceived sovereign powers to the detriment of stateless people.

2.4 Naturalizing Measures

While taking steps to prevent future statelessness, it is also necessary to tackle present statelessness. As noted in previous chapters, one of the reasons for the conception of the right to nationality was to tackle the statelessness of the millions of stateless people in pre-WWII Europe. This aim was abandoned in favour of efforts being directed towards preventing future statelessness, following the collapse of negotiation on the draft Protocol on Elimination of Present Statelessness⁸⁸ which sought to deal with the then existing statelessness. Thus, the right to nationality as conceived under the UDHR was supposed to be a means of preventing future statelessness in the post-WWII world by its assertion that everyone has a right to be a part of a people or to be a member of a state, and that no one should be arbitrarily deprived of his nationality.

It seems, however, that the proponents of the right to nationality as a means of preventing future statelessness either did not take into account the identity sentiment that is attached to nationality at all, or did not fully anticipate it. This sentiment accounts for the existence of more than twelve million stateless people around the world today. The fate of these twelve million stateless people ought to not be sealed like that of their pre-WWII counterparts who seemed to have been left in the lurch following the collapse of debates on the Protocol on Elimination of Present Statelessness. Hence the need for the adoption of naturalizing measures.

Naturalizing measures would involve granting nationality *via* naturalization to (present) stateless people. However, citizenship by naturalization carries with it the suggestion that the people were otherwise not entitled to it, or that they are otherwise foreigners. The national laws of some countries also make differentiation between rights and privileges enjoyed by those who acquired citizenship by birth and naturalized citizens. In Burma for example, the citizenship of a naturalized citizen may be revoked if he, for example, shows “disaffection or disloyalty to the

⁸⁸ See pages 65 – 68 above.

State by any act or speech”, or gives “information relating to a State secret to any person, or commits “an offence involving moral turpitude for which he has been sentenced to imprisonment for a minimum term of one year or to a minimum fine of kyats one thousand”.⁸⁹ Those who acquired citizenship by birth would not lose their citizenship in such situations.⁹⁰ Similarly under the Kuwaiti nationality law, unlike one who acquires citizenship by birth, naturalized citizens do not have the right to vote in any parliamentary elections within 30 years from the date of their naturalization.⁹¹ A naturalized citizen, unlike one who acquires citizenship by birth, may also have his/her citizenship revoked:

- (a) where naturalization has been acquired by virtue of fraud or on the basis of a false declaration. Kuwaiti nationality which has been acquired by any dependant of any such person may also be revoked;
- (b) where, within 15 years of the grant of naturalization, a person is convicted of any honour related crime or honesty-related crime. In such case, the nationality of the convicted person alone may be revoked;
- (c) where, within 10 years of the grant of naturalization, a person is dismissed from public office on disciplinary grounds for reasons relating to honour or honesty;
- (d) where the competent authorities have evidence that a naturalized person has disseminated opinions which may tend seriously to undermine the economic or social structure of the State or that he is a member of a political association of a foreign State. Kuwaiti nationality which has been acquired by any dependant of any such person may also be revoked.⁹²

Although the above differentiations between rights and privileges pertaining to citizenship by birth and naturalization in Burma and Kuwait place the Rohingya and Bidoons in disadvantaged position in their respective societies, naturalization is nonetheless an effective solution to their statelessness. Available evidence suggests that some states have taken this measure in respect of their stateless population. For example, the Sri Lankan parliament passed a law which granted citizenship to more than 168,000 hitherto stateless Tamils in 2003.⁹³ In 2000, the government of Indonesia also granted citizenship to about 140,000 stateless ethnic Chinese.⁹⁴ The Kuwaiti Parliament has also recently passed a law (2013) which would grant 4000 ‘foreigners’ Kuwaiti

⁸⁹ *Burma Citizenship Law* 1982, section 58 (d), (e) and (f).

⁹⁰ *Ibid*, section 17.

⁹¹ *Nationality Law* 1959 [Kuwait], section 6.

⁹² *Ibid*, section 13.

⁹³ Weissbrodt, *supra*, note 16, at 103.

⁹⁴ *Ibid*.

citizenship.⁹⁵ Burma is also reportedly considering granting citizenship to ‘third generation’ Rohingyas.⁹⁶

While it is much more desirable that such naturalizing measures of the Rohingyas and other stateless people should be employed by their respective states, with which they have genuine and effective links, other states may also step in and grant these stateless people citizenship.

2.5 An Independent ‘Homeland’ (state) for the Rohingyas?

As noted in chapter one, the Rohingyas face the unique scenario of being rejected on all sides, that is, by both Burma and neighboring Bangladesh at the same time. Their situation is not dissimilar to the travails of millions of German Jews in Europe and other places in the 1940s. There are at least three basic similarities between the situation of German Jews in the 1940s and the present-day Rohingyas: (a) just as the German Jews were rendered stateless as a result of their denationalization by the Nazis, the Rohingyas are stateless as a result of Burmese Citizenship Law of 1982, (b) like the German Jews who faced various forms of persecution as a result of the anti-Semitic policies of the Nazis, the Rohingyas face persecution from their mainly Buddhist neighbours, and (c) just as the Nazis planned to deport the Jews of Europe to Madagascar, then a French island colony off the southeast coast of Africa as a solution to the infamous “Jewish question”,⁹⁷ the Burmese government have proposed sending the Rohingyas to a “third country” as “the solution” to ethnic clashes between the Muslims Rohingyas and their

⁹⁵ See pages 20 – 21 above.

⁹⁶ See Dean Nelson, “Burma considers citizenship for Rohingya Muslims” The Telegraph, 12 November 2012, online: Telegraph Media Group <<http://www.telegraph.co.uk/news/worldnews/asia/burmamyanmar/9648329/Burma-considers-citizenship-for-Rohingya-Muslims.html>>.

⁹⁷ For further details on the Nazi’s so-called “Madagascar Plan” see Christopher R Browning, *The Origins of the Final Solution: The Evolution of Nazi Jewish Policy, September 1939 – March 1942* (Jerusalem: Yad Vashem, 2004), 36-89; David Cesarani, *The Jewish Chronicle and Anglo-Jewry: 1841–1991* (Cambridge; New York: Cambridge University Press, 1994), 158-165; Mark Avrum Ehrlich, *Encyclopedia of the Jewish Diaspora: Origins, Experiences, and Culture*, Vol. 1 (Santa Barbara, CA: ABC-CLIO, 2009), 452; Richard J Evans, *The Third Reich at War* (New York: Penguin, 2008).

mainly Buddhist neighbors.⁹⁸ In addition, as discussed in chapter four, the various township meetings held by Buddhist monks representing the sangha in Rathedaung Township between July and September 2012, have set out plans for “‘Arakan Ethnic Cleansing Program’ of bad pagan [Rohingyas]”.⁹⁹ The foregoing raise genuine fears as to whether history is about to repeat itself.

Although the Holocaust played a major role in the establishment of the modern state of Israel in 1948, there is no doubt that the establishment of modern Israel gave opportunity to millions of stateless Jews to become citizens of an organized political community. As Arendt succinctly puts it, the establishment of Israel was a “restoration of human rights” for the hitherto stateless and rightless European Jews.¹⁰⁰ The creation of modern Israel, as well as the recent creation of present ‘independent’ Kosovo as a fallout of the Bosnia ‘genocide’, suggests that creation of homelands is a viable means protecting otherwise persecuted minority population like the Rohingyas.

In the above premise, creation of a homeland (independent state) for the Rohingyas would be a very effective means of solving their statelessness. However, it is necessary to acknowledge a major challenge inherent in this proposal, namely, states traditionally guard their territorial integrity jealously. This raises the question of which state will cede its territory for the creation of an independent homeland for the Rohingyas, since there is hardly any *terra nullius*. The challenge is however not insurmountable if there is a collective will on the part of the international community address this issue.

2.6 Diplomatic and other Pressures on Erring States

Another collective measure which may be undertaken by the international community is to exert diplomatic and other pressures on countries, like Burma and Kuwait, to repeal or amend

⁹⁸ See footnote 53 and the accompanying text on page 12 above.

⁹⁹ See pages 119 – 120 above.

¹⁰⁰ Hannah Arendt, *The Origins of Totalitarianism* (Cleveland: The World, 1958), 299.

denationalizing legislations, and/or sign up to the relevant international instruments or withdraw their reservations.

As already noted, Burma is not a party to most of the relevant international instruments while Kuwait has entered reservations to the operative provisions of most relevant international instruments. The recent events in Syria, that is the alleged use of chemical weapons by the Syrian regime in late August 2013, and its aftermath, may serve as a model for the Rohingyas and Burma. Like Burma, Syria was not a party to the Chemical Weapons Convention, but this did not make any difference as Syria was generally regarded to be in breach of international law, and in fact there was no question regarding its obligation under the Chemical Weapons Convention even though it was not a party.

Thus, just as Syria was unable to escape international condemnation under the Chemical Weapons Convention, Burma should also be held accountable for its failure to respect the right to nationality of the Rohingyas under the various international instruments. Again, the successful pressure on the Syria regime that made it ratify the Chemical Weapons Conventions and agreed to give up its chemical arsenal may also be very good model for Burma and Kuwait.

2.7 Minimization/Reduction Measures

While steps are being taken to eliminate statelessness, minimization or reduction measures seek to reduce the harsh effects of statelessness by allowing stateless people to enjoy some of the rights ordinarily available only to citizens.¹⁰¹ Such measures include, for example, issuing identity papers to any stateless person who does not possess a valid travel document, or allowing them access to education, gainful employment, right to own properties, etc. This was the main objective of the 1954 Convention on the Status of Stateless Person (CSSP), but as noted in previous chapters, very few countries have ratified this convention.

¹⁰¹ Weissbrodt, *supra*, note 16, at 104.

As observed by Weissbrodt, such measures “should never been seen as replacement” for measures aimed at eliminating statelessness altogether.¹⁰² They are nonetheless very useful in alleviating the “difficulties of statelessness”.¹⁰³ Whilst it is also desirable that such measures should be employed by states with which the stateless persons have genuine effective links, other states can also take alleviating steps as well. An example of such steps would be to do as Canada has done from 2007 to 2010, when it became the first, and so far the only, country to allow Rohingya refugees to settle in Canada.¹⁰⁴ However, the resettlement process stopped since November 2010 following the Bangladeshi government’s refusal to issue travel documents to the stateless Rohingya refugees in various camps in Bangladesh.¹⁰⁵

The refusal of the Bangladeshi government to issue travel documents to the stateless Rohingyas highlights one of the major problems of stateless persons: absence of valid travel documents. Article 28 of the CSSP was supposed to deal with this problem and it obliges states parties to issue travel documents, generally known as Convention Travel Document (CTD), to stateless persons *who are lawfully* staying in their state. The CTD is designed to function in lieu of a passport and may also entitle the holder to re-enter the issuing state.¹⁰⁶ However, as previously noted, very few states are parties to this convention and, more importantly, it applies only to stateless persons *lawfully* in the territory of contracting states – whereas a large majority of stateless people are illegal refugees wherever they are.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ See UNHCR, “Canada is first country to resettle Rohingya refugees from Bangladesh” (News Stories, 20 April 2007), online: UNHCR <<http://www.unhcr.org/4628d83d4.html>>.

¹⁰⁵ See Jacques Gallant, “Persecuted Rohingyas who fled to Canada remember harsh life in native Burma” *The Star* (22 August 2012), online: Toronto Star Newspaper <http://www.thestar.com/news/world/2012/08/22/persecuted_rohingyas_who_fled_to_canada_remember_harsh_life_in_native_burma.html>.

¹⁰⁶ Laura van Waas, “Nationality and Rights” in Brad K. Blitz & Maureen Lynch, eds., *Statelessness and Citizenship: A Comparative Study on the Benefit of Nationality* (Oxford: Oxford Brookes University, 2009) 24.

The “world” passports issued by the World Service Authority (WSA) founded by Gary Davies maybe also useful in this regard.¹⁰⁷ As noted in chapter two, the “world” passport is the “official travel document” issued to “citizens of the world” who, like stateless people, generally do not come under the protection of any state, albeit as a result of their deliberate act of renouncing their citizenships without acquiring another.¹⁰⁸ The WSA has so far reportedly issued 2,500,000 “world passports” and over 180 countries have reportedly accepted the world passport at one time or another.¹⁰⁹ Stateless persons could be allowed to use this document as official travel documents.

2.8 The Role of the Media

As observed by a UNESCO Declaration on the media,¹¹⁰ the “mass media throughout the world, by reason of their role, contribute to promoting human rights, in particular by giving expression to oppressed peoples who struggle against colonialism, neo-colonialism, foreign occupation and all forms of racial discrimination and oppression and who are unable to make their voices heard within their own territories”.¹¹¹ Thus, the media plays a very important role in promoting human rights; it not only helps to expose human rights abuses, it also shapes public opinion in respect of the abuses.¹¹²

¹⁰⁷ See World Government of World Citizens, “What is the World Government of World Citizens?” online: WGWC <<http://www.worldservice.org/gov.html>>[*What is WGWC?*].

¹⁰⁸ See pages 33-34 above.

¹⁰⁹ Daniel Engber, “What’s a World Passport?”, Slate 24 March 2006, online: Slate <http://www.slate.com/articles/news_and_politics/explainer/2006/03/whats_a_world_passport.html?nav=tap3>.

¹¹⁰ UNESCO, Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racism, apartheid and Incitement to War, 28 November 1978, online: UNESCO <http://portal.unesco.org/en/ev.php-URL_ID=13176&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

¹¹¹ *Ibid*, Article II(3).

¹¹² See generally, Jay S. Ovsiovtch, “News Coverage of Human Rights” (1993) 46:3 Political Research Quarterly 671 at 672 – 681; Noam Schimmel, “Media Accountability to Investigate Human Rights Violations” (2009) 21:4 Peace Review 442 – 447; Gitanjali Wolfermann, *Between Ideals and Realities: Elucidating the Role of the Media in Promoting Human Rights* (Florida: Boca Raton, 2010), 8-18; International Council on Human Rights Policy, *Journalism*,

In relation to the right to nationality of stateless people like the Rohingyas, Bidoons and Non-citizens of Latvia, the role of the media has been fairly limited. As seen in chapter one, the Rohingyas gained (mainstream) media attention as a result of the “Rohingya boat people” incidence.¹¹³ This media attention, as seen in chapter three, is yielding encouraging signs such that subsequent UNGA Resolutions on Burma now make specific reference to the Rohingyas and their nationality travails.¹¹⁴ However, the Bidoons and Non-citizens of Latvia have not attracted much mainstream attention and this has made their sufferings less known to the international community.

A change in perception of nationality will put media reports of the travails of stateless people in proper perspective, namely as a violation of human right to nationality. This is because the emphasis of most of the media reports on the Rohingyas has been on the treatment they receive as “refugees”, for example, the horrific treatment meted out on them by Thai Navy, rather than on their statelessness. In other words, the media tend to underplay or underestimate the impact of their statelessness on travails, whereas as seen in previous chapters, their statelessness is the root cause of their sufferings.

2.9 The Role of Individuals/ Scholars

Individuals, especially legal scholars, have roles to play in the fight against statelessness, which has unfortunately attracted limited scholarly attention. It is not unusual to pick a book on “International Human Rights Law” and find out that the book does not make any reference to “right to nationality”.¹¹⁵ This is either because most scholars take nationality for granted or *sub*

Media and the Challenge of Human Rights Reporting (Versoix- Switzerland: International Council on Human Rights Policy, 2002), 27 – 33.

¹¹³ See page 11 above.

¹¹⁴ See pages 77 – 80 above.

¹¹⁵ See for example, Michael Haas, *International Human Rights: A Comprehensive Introduction* (Oxon: Routledge, 2008); Mark Gibney, *International Human Rights Law - Returning to Universal Principles* (Lanham: Rowman & Littlefield, 2008); David Robertson, *A Dictionary of Human Rights* (London-UK: Europa, 1997); Robert McCorquodale, ed, *Human Rights* (Burlington: Ashgate, 2003); Michael K. Addo, ed., *International Law of Human Rights*

silentio do not see it as a human right. However, the importance of nationality requires everyone, including legal scholars, rights activists, and NGOs, to *take the right to nationality seriously*. Taking the right seriously requires, amongst others, frequent public and other interactive forums to discuss the right to nationality, as well as highlighting the undesirable and harsh effects of statelessness.

It has been said that “someone who, by acquiring medical training, comes to understand the human body acquires as well a moral duty not just to observe disease, but to try to cure it.”¹¹⁶ In the same way, one can also say that everyone who acquires knowledge of the sufferings associated with statelessness acquires a duty not simply to observe or empathize with their sufferings but also to try to be part of the solution. In this quest for solution, everyone’s effort counts. In the words of Robert Kennedy, quoted by Professor Koh – to stress the need for individual efforts in the enforcement of international human rights law:

Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current that can sweep down the mightiest walls of oppression and resistance.¹¹⁷

As Koh rightly points out, everyone has a role to play in the enforcement of human rights generally and specifically the right to nationality of stateless people. The roles range from talking or writing about right to nationality, to lobbying local politicians to enact requisite legislation and/or exert necessary pressures on countries like Burma and Kuwait to respect the right of the Rohingyas and Bidoons respectively.

(Burlington: Ashgate, 2006); Stephen James, *Universal Human Rights: Origins and Development* (New York: LFB Scholarly, 2007); Rhona K.M. Smith, *Textbook on International Human Rights*, 3ed, (Oxford: Oxford University Press, 2003); Mashood A. Baderin and Manisuli Ssenyonjo, eds., *International Human Rights Law, Six Decades after the UDHR and Beyond* (Surrey: Ashgate, 2010).

¹¹⁶ See Harold Hongju Koh, “How Is International Human Rights Law Enforced?” (1999) 74: 4 *Indiana Law Journal* 1397, at 1416.

¹¹⁷ *Ibid.*

3.0 CONCLUSION

Like most other human problems, statelessness can be eradicated if there is a WILL on the part of the international community to do so. It may not be solved by waving a ‘right to nationality’ like a magic wand without a corresponding WILL to ensure that states respect the right. Unlike most other rights, which “99 per cent of the time I can fully respect... simply by ignoring you,”¹¹⁸ the right to nationality denotes acceptance of the right bearer as being a “part of us” and allowing the right bearer to enjoy all the rights and privileges associated with it. It is the failure or refusal to accept the stateless Rohingyas, Bidoons and “Non-citizens” as “part of us” in their respective countries that has been the stumbling block to the enforcement or respect of their right to nationality.

In order to effectively tackle the rejection of stateless people as part of their respective countries, a robust collaborative approach is necessary. The starting point, as noted above, is a re-conceptualization of statelessness, that is, seeing statelessness simply as a violation of human right to nationality, and then taking the right and suffering associated therewith seriously.

¹¹⁸ Douglas Hodgson, *Individual Duty Within a Human Rights Discourse* (Hants-England: Ashgate, 2003), 37.

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